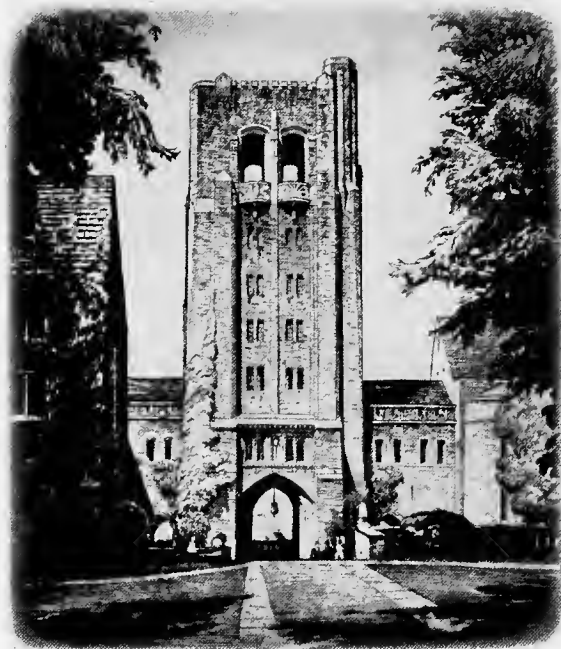


CORNELL LAW LIBRARY

Digitized by Microsoft®

KD
660
C19



Cornell Law School Library

This book was digitized by Microsoft Corporation in cooperation with Cornell University Libraries, 2007.

You may use and print this copy in limited quantity for your personal purposes, but may not distribute or provide access to it (or modified or partial versions of it) for revenue-generating or other commercial purposes.

RD 660.019

Principles of English law :founded on BI



3 1924 021 661 461

PRINCIPLES OF ENGLISH LAW.

PRINCIPLES OF ENGLISH LAW

FOUNDED ON
BLACKSTONE'S COMMENTARIES.

BY

ROBERT CAMPBELL, M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW; ADVOCATE OF THE SCOTCH BAR;
EDITOR OF "RULING CASES," ETC.

*“χρώμεθα γὰρ πολιτεία οὐ ζηλούσῃ τοὺς τῶν πέλας νόμους,
παράδειγμα δὲ μᾶλλον αὐτοὶ ὄντες τινὶ ἢ μιμούμενοι ἑτέροισι.”*
THUCYD. ii. 37.

LONDON:
STEVENS AND SONS, LIMITED,
119 & 120, CHANCERY LANE,
Law Publishers.
1907.

LA 15333

TO HIS FRIEND, THE RIGHT HONOURABLE

JAMES BRYCE,

THIS VOLUME IS INSCRIBED
WITH HEARTY GOOD WISHES

BY
THE AUTHOR.

P R E F A C E.

IN this work on the "Principles of English Law," I have followed, in the main, the arrangement of Blackstone's commentaries. The arrangement has the sanction of long usage: and the work of Sir W. Blackstone, in its numerous editions, whether under the name of Blackstone's or Stephens' commentaries, or under any other name, still holds the field as the only successful attempt to present the whole field of English law in a literary and intelligible form.

It is, however, desirable that the principles of the law should be set forth more concisely than either Sir W. Blackstone or his editors have attempted to do: and also it is time—having regard to the radical changes, both in substantive law and procedure, made in the last century—that the whole subject should be treated from the modern point of view. This has been the aim of the present work.

I must here acknowledge the kind assistance of friends in passing the work through the press.

Mr. C. R. L. Fletcher, of Magdalen College, Oxford, has given me many useful suggestions on historical points.

I am indebted to *the late* Professor Maitland for the clue to a point of obscure history referred to on p. 11.

Mr. Houston, K.C., has assisted me in the statement of the method and effect of the introduction of English common and statute law into Ireland.

On subjects of special knowledge I have had the advantage of consultation with Professor T. E. Holland and Professor Vinogradoff at Oxford, and Mr. P. C. Gaul (Fellow of Trinity Hall) at Cambridge.

I have also to acknowledge a kind interest taken in the progress of the work by Sir Wm. Markby, of All Souls College, Oxford, and by Professor Westlake. And in consulting records I have received valuable assistance from Sir Henry Maxwell Lyte, and also, in reading old records, from Mr. George James Turner, of Lincoln's Inn, barrister-at-law.

R. CAMPBELL.

May, 1907.

CONTENTS.

INTRODUCTORY.

CHAPTER	PAGES
I. DEFINITIONS	1-6
II. TERRITORIES GOVERNED BY ENGLISH LAW	7-27
III. GENERAL ARRANGEMENT OF TOPICS	27-31

PART I.—*STATUS*.

(A) Public Privileges and Franchises.

IV. OF THE KING (OR QUEEN REGNANT)	32-35
V. OF THE ROYAL FAMILY	36-37
VI. OF TITLES OF DIGNITY	37-38
VII. OF INFERIOR EXECUTIVE AND JUDICIAL OFFICERS ...	38-41
VIII. OF NATURAL BORN BRITISH SUBJECTS, PERSONS NATURAL- ISED, AND ALIENS	41-43
IX. OF ECCLESIASTICAL PERSONS	44-45
X. OF THE NAVY AND ARMY	45-47
XI. OF CORPORATIONS	47-54

(B) Conditions (or Status) arising from Private Relations.

XII. HUSBAND AND WIFE	54-82
XIII. PARENT AND CHILD	83-87
XIV. GUARDIAN AND WARD	87-90
XV. MASTER AND SERVANT	90-96
C.	<i>b</i>

PART II.—OWNERSHIP OR PROPERTY.

CHAPTER	PAGES
XVI. PROPERTY IN GENERAL, AND PARTICULARLY IN LANDS, TENEMENTS, AND HEREDITAMENTS	97-114
XVII. THE FEUDAL SYSTEM, AND THE ORIGIN OF TENURE	114-119
XVIII. THE MANOR AND THE VILLAGE COMMUNITY ...	119-122
XIX. OF FREEHOLD ESTATES IN LANDS, TENEMENTS, AND HEREDITAMENTS	122-142
XX. OF ESTATES OR INTERESTS LESS THAN FREEHOLD IN LANDS, TENEMENTS, AND HEREDITAMENTS ...	142-147
XXI. OF THE POWERS OF A TENANT FOR LIFE UNDER THE SETTLED LAND ACTS	148-155
XXII. RIGHTS BY WAY OF SECURITY OVER LANDS, TENE- MENTS, AND HEREDITAMENTS	155-159
XXIII. REMAINDERS, VESTED AND CONTINGENT, AND OTHER ESTATES <i>IN FUTURO</i> (IN LANDS, TENEMENTS, AND HEREDITAMENTS)	160-167
XXIV. OF TENEMENTS HELD IN SEVERALTY, IN JOINT TENANCY, IN CO-PARCENARY, AND IN COMMON	168-177
XXV. OF THE TITLE (CONSIDERED GENERALLY) TO LANDS, TENEMENTS, AND HEREDITAMENTS	177-181
XXVI. OF TITLE (TO LANDS, TENEMENTS, AND HEREDITA- MENTS) BY DESCENT	181-185
XXVII. OF TITLE (TO LANDS, ETC.) BY PURCHASE ...	186-196
XXVIII. OF THE VARIOUS ASSURANCES OR MODES OF ALIENA- TION (OF LANDS, ETC.)	196-217
XXIX. OF PERSONAL PROPERTY	217-224
XXX. OF THE TITLE TO PERSONAL PROPERTY	225-297
SECTION 1. Occupancy (including Title by Invention, etc.)	225-237
2. Prerogative and Forfeiture	238-240
3. Custom	240
4. Succession and Marriage	240-242
5. Judgment	242-244
6. Gift or Grant, Contract or Assignment	244-269
7. Bankruptcy	269-274
8. Testament and Administration	274-297

CHAPTER	PAGES
XXXI. RIGHTS IN SECURITY OVER MOVEABLES ...	297-322
XXXII. OF PROPERTY HELD IN TRUST	322-327

PART III.—OBLIGATIONS.

XXXIII. OBLIGATIONS—ARRANGEMENT OF SUBJECT AND GENERAL PRINCIPLES APPLICABLE TO CONTRACT	328-337
XXXIV. CONTRACT—GRATUITOUS BAILMENTS	337-338
XXXV. CONTRACT (<i>continued</i>)—DEBT	338-339
XXXVI. CONTRACT (<i>continued</i>)—BY WRITTEN INSTRUMENTS OPERATING “ACCORDING TO THE CUSTOM OF MER- CHANTS”	340
XXXVII. CONTRACTS PERFECTED BY CONSENT (GENERALLY)	340-344
XXXVIII. SALE AS A CONTRACT	344-346
XXXIX. BAILMENTS FOR REWARD	347-357
XL. INSURANCE	357-384
XLI. AGENCY, ETC.	384-398
XLII. PARTNERSHIP	399-406
XLIII. INNOMINATE CONTRACTS	406-407
XLIV. OBLIGATIONS <i>QUASI EX CONTRACTU</i>	408-415
XLV. OBLIGATIONS <i>EX DELICTO</i> (TORTS)	415-436

PART IV.—CIVIL PROCEDURE.

XLVI. SUPERIOR COURTS OF CIVIL JURISDICTION BEFORE THE JUDICATURE ACTS	437-445
XLVII. ORGANISATION OF THE SUPERIOR COURTS UNDER THE JUDICATURE ACTS	445-453
XLVIII. THE ORGANISATION OF LAW AGENCY	453-461
XLIX. PROCEDURE BEFORE THE SUPREME COURT (ACTIONS GENERALLY)	461-492
L. PROCEDURE IN BANKRUPTCY	492-498
LI. PROCEDURE IN THE ADMINISTRATION OF THE REAL AND PERSONAL ESTATES OF A DECEASED	498-503

PART V.—*CRIMES AND CRIMINAL PROCEDURE.*

I. Offences of a Public Nature.

CHAPTER	PAGES
LII. TREASON (INCLUDING TREASON-FELONY)	506-509
LIII. OFFENCES AGAINST THE CROWN AND GOVERNMENT NOT NOW DEALT WITH AS TREASON	509-515
LIV. OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP ...	515-518
LV. OFFENCES AGAINST PUBLIC JUSTICE	518-523
LVI. OFFENCES AGAINST THE PUBLIC PEACE	523-528
LVII. OFFENCES AGAINST PUBLIC TRADE	529-543
LVIII. CONSPIRACY	544-546
LIX. OFFENCES AGAINST PUBLIC MORALS	547-561

II. Offences primarily concerning Individuals.

A. Offences against the Person.

LX. MURDER, ETC.	561-568
LXI. ASSAULT	568-570
LXII. FALSE IMPRISONMENT	570-574
LXIII. ABDUCTION, ETC.	574-575
LXIV. RAPE, ETC.	575

B. Offences against Property.

LXV. LARCENY, ETC.	576-586
LXVI. FORGERY	586-589
LXVII. MALICIOUS DAMAGE TO PROPERTY	589-594

CRIMINAL PROCEDURE.

LXVIII. COURTS OF CRIMINAL JURISDICTION	595-604
LXIX. CRIMINAL PROCEEDINGS RESULTING IN A TRIAL BEFORE A JURY	604-619
LXX. PROCEEDURE UNDER STATUTES AUTHORISING SUMMARY CONVICTION	619-625
LXXI. CRIMINAL APPEAL	625-632
INDEX	633-662

TABLE OF CASES.

	PAGE
Aas <i>v.</i> Benham (1891), 2 Ch. 244; 65 L. T. 25 (19 R. C. 582)	403
Acatos <i>v.</i> Burns (C. A. 1878), 47 L. J. Ex. 566; 3 Ex. D. 282; 26 W. R. 624	252, 397
Adam <i>v.</i> Newbigging (H. L. 1888), 57 L. J. Ch. 1066; 13 App. Cas. 308; 59 L. T. 267; 37 W. R. 97	403
Adams <i>v.</i> Lindsell (1818), 1 B. & Ald. 681	341
Agar Ellis, <i>Re</i> (1878), 48 L. J. Ch. 4; 10 Ch. D. 49; 39 L. T. 380; 27 W. R. 117	85
Agar Ellis, <i>Re</i> (1883), 53 L. J. Ch. 10; 24 Ch. D. 317; 50 L. T. 161; 32 W. R. 1	85
Ailesbury's (Marquis of) Settled Estates (1892), 61 L. J. Ch. 116; 62 L. J. Ch. 95; (1892), 1 Ch. 506; (1892), A. C. 356; 65 L. T. 830; 67 L. T. 490 (24 R. C. 92)	151
Aitchison <i>v.</i> Lohre (H. L. 1879), 49 L. J. Q. B. 123; 4 App. Cas. 755; 41 L. T. 323; 28 W. R. 1 (14 R. C. 448)	373, 382
Aldred's Case (1609), 9 Co. Rep. 576	417
Allan <i>v.</i> Bennett (1810), 3 Taunt. 169	344
Allen <i>v.</i> Carter (1870), 39 L. J. C. P. 212; L. R. 5 C. P. 414; 22 L. T. 586	422
Allen <i>v.</i> Flood (H. L.), 67 L. J. Q. B. 119; (1898), A. C. 1 (17 R. C. 285)	96
Allen <i>v.</i> Sugrue (1828), 7 L. J. K. B. 53; 8 B. & C. 561	380
Anderson <i>v.</i> Gorrie (C. A. 1894), 1895, 1 Q. B. 668; 71 L. T. 382	432
Anderson <i>v.</i> Morice (1876), 46 L. J. C. P. 11; 1 App. Cas. 713; 35 L. T. 506; 25 W. R. 14	361
Anderson <i>v.</i> Ocean S.S. Co. (1884), 54 L. J. Q. B. 192; 10 App. Cas. 107; 52 L. T. 441; 33 W. R. 433 (14 R. C. 409)	382
Anderson <i>v.</i> Radcliffe (1858), 29 L. J. Q. B. 128; El. Bl. & El. 806; 6 Jur. (N. S.) 578; 8 W. R. 283	334
Andrews <i>v.</i> Andrews; D'Angibau, <i>In re</i> (C. A. 1880), 49 L. J. Ch. 756; 15 Ch. D. 228; 43 L. T. 135; 28 W. R. 930	385
Apollinaris Company's Trade Mark, <i>In re</i> (C. A. 1890), 61 L. J. Ch. 625; (1891), 2 Ch. 186; 65 L. T. 6	236
Argos, Cargo Ex. (1873), L. R. 5 P. C. 134; 28 L. T. 745; 21 W. R. 707	397
Arthur <i>v.</i> Barton (1840), 6 M. & W. 138	395
Arundell <i>v.</i> Bell (C. A. 1883), 52 L. J. Ch. 537; 49 L. T. 345; 31 W. R. 477	405
Asfar <i>v.</i> Blundell (C. A. 1895), 65 L. J. Q. B. 138; (1896), 1 Q. B. 123; 73 L. T. 648; 44 W. R. 130	362
Ashbury Railway, &c., Co. <i>v.</i> Riche (1875), 44 L. J. Ex. 185; L. R. 7 H. L. 653 (2 R. C. 304)	386
Asher <i>v.</i> Whitlock (1865), 35 L. J. Q. B. 17; L. R. 1 Q. B. 1; 11 Jur. (N. S.) 925; 14 W. R. 26 (11 R. C. 541)	324
Atkinson <i>v.</i> Newcastle, &c., Waterworks Co. (1877), 46 L. J. Ex. 775; 2 Ex. D. 441; 36 L. T. 761; 25 W. R. 791	421

	PAGE
Atlantic Mutual Insur. Co. v. Huth (C. A. 1880), 16 Ch. D. 474; 44 L. T. 67; 29 W. R. 387	253, 298
Att.-Gen. v. Emerson (H. L. 1891), 61 L. J. Q. B. 79; (1891), A. C. 649; 65 L. T. 564 (23 R. C. 739)	107 n.
Aubert v. Gray (1862), 32 L. J. Q. B. 50; 3 B. & S. 163; 9 Jur. (N. S.) 714; 7 L. T. 469; 11 W. R. 27 (14 R. C. 139)	333
Australasian, &c., Co. v. Morse (1872), L. R. 4 P. C. 222; 27 L. T. 357; 20 W. R. 728 (24 R. C. 293)	397, 398
Baddeley v. Earl Granville (1887), 56 L. J. Q. B. 501; 19 Q. B. D. 423; 57 L. T. 268; 36 W. R. 63 (17 R. C. 212)	421
Bainbridge v. Neilson (1806), 10 East, 329 (1 R. C. 112)	380
Baines v. Holland (1855), 24 L. J. Ex. 204; 8 Exch. 802	370
Baker Doe d. v. Coombes (1850), 19 L. J. C. P. 306; 9 C. B. 714 (16 R. C. 337)	180 n.
Baker v. Hedgecock (1888), 57 L. J. Ch. 889; 39 Ch. D. 520; 59 L. T. 361; 36 W. R. 840	332
Balkis Consolidated Co. v. Tomkinson (1893), 63 L. J. Q. B. 134; (1893), A. C. 396; 69 L. T. 598; 42 W. R. 204	387
Ballantyne v. Mackinnon (C. A. 1896), 65 L. J. Q. B. 616; (1896), 2 Q. B. 455; 75 L. T. 95; 45 W. R. 70	369
Ballard v. Tomlinson (C. A. 1885), 54 L. J. Ch. 454; 29 Ch. D. 115; 52 L. T. 942; 33 W. R. 533	417
Banks v. Goodfellow (1870), 39 L. J. Q. B. 237; L. R. 5 Q. B. 549; 22 L. T. 813 (16 R. C. 713)	279
Barber v. Fletcher (1779), 1 Dougl. 305 (13 R. C. 532)	365
Barclay v. Pearson (1893), 62 L. J. Ch. 636; (1893), 2 Ch. 154; 68 L. T. 709; 42 W. R. 74	334
Baring v. Corrie (1818), 2 B. & Ald. 137 (2 R. C. 391)	389, 392
Barker v. Janson (1868), 37 L. J. C. P. 105; L. R. 3 C. P. 303; 17 L. T. 473; 16 W. R. 399 (14 R. C. 222)	371
Barnes v. Toye (1884), 53 L. J. Q. B. 567; 13 Q. B. D. 410; 51 L. T. 292; 33 W. R. 15	330
Barnes v. Ward (1850), 19 L. J. C. P. 195; 9 C. B. 392; 14 Jur. 334; 2 C. & K. 661	549
Bartlett v. Pentland (1830), 8 L. J. K. B. 264; 10 B. & C. 760	393
Bartonshill Coal Co. v. Reid (1858), 1 Paterson, 785; 3 Macq. 266	93
Barton-upon-Humber District Water Co., <i>In re</i> (1889), 58 L. J. Ch. 613; 42 Ch. D. 585; 38 W. R. 8 (7 R. C. 435)	51
Barwick v. English Joint Stock Bank (Ex. Ch. 1867), 36 L. J. Ex. 147; L. R. 2 Ex. 259; 16 L. T. 461; 15 W. R. 877 (12 R. C. 298)	95
Basingstoke Canal Proprietors, <i>Re</i> (1866), 14 W. R. 956	51
Baumwoll Manufactur, Von Carl Scheibler v. Furness (1893), 62 L. J. Q. B. 201; (1893), A. C. 8; 68 L. T. 1	349
Bayley v. Manchester, &c., Ry. Co. (Ex. Ch. 1873), 42 L. J. C. P. 78; L. R. 8 C. P. 148; 28 L. T. 366 (25 R. C. 115)	94
Bazeley v. Forder (1868), 37 L. J. Q. B. 237; L. R. 3 Q. B. 559; 18 L. T. 756; 9 B. & S. 599	83
Beatson v. Haworth (1796), 6 T. R. 531 (9 R. C. 385)	374
Beatty v. Gillbanks (1882), 51 L. J. M. C. 117; 9 Q. B. D. 308; 47 L. T. 194; 31 W. R. 275; 46 J. P. 789	523 n.
Beauchamp, <i>Ex parte</i> , Beauchamp, <i>re</i> (C. A. 1893), 63 L. J. Q. B. 101; (1894), 1 Q. B. 1; 69 L. T. 646; 42 W. R. 110; s.c. 63 L. J. Q. B. 802; (1894), A. C. 607; 71 L. T. 587; 43 W. R. 129	270
Beauchamp (Earl) v. Winn (1873), L. R. 6 H. L. 223; 22 W. R. 193 (22 R. C. 889)	105
Beckwith v. Philby (1827), 6 B. & C. 635	606
Bell v. Carstairs (1818), 14 East, 374 (14 R. C. 319)	378
Bell v. Hobson (1812), 16 East, 240 (13 R. C. 578)	366
Bell v. Reid (1813), 1 M. & S. 726	43

	PAGE
Benson v. Duncan (Ex. Ch. 1849), 18 L. J. Ex. 169; 3 Ex. 644; 14 Jur. 218	398
Berkeley v. Hardy (1826), 4 L. J. K. B. 184; 5 B. & C. 355 (2 R. C. 274)	385
Besant v. Great Western Ry. Co. (1860), 8 C. B. (N. S.) 368.	421
Blachford v. Preston (1799), 8 T. R. 89 (6 R. C. 338)	332
Blackenhagen v. London Assur. Co. (1808), 1 Camp. 454 (13 R. C. 650)	367, 375
Blackett v. Royal Exchange Assur. Co. (1832), 2 Cr. & J. 244 (14 R. C. 179)	368, 371
Blades v. Higgs (H. L. 1865), 34 L. J. C. P. 286; 11 H. L. Cas. 621; 20 C. B. (N. S.) 214; 11 Jur. (N. S.) 701; 12 L. T. 615 (11 E. R.; 3 R. C. 76)	222
Blagg v. Sturt (1847), 16 L. J. Q. B. 59; 10 Q. B. 899; 11 Jur. 1011 (9 R. C. 117)	527
Blakemore v. Bristol & Exeter Ry. Co. (1857), 8 El. & Bl. 1035	338
Blaker v. Herts & Essex Waterworks Co. (1889), 58 L. J. Ch. 497; 41 Ch. D. 399; 60 L. T. 776; 37 W. R. 601 (7 R. C. 428)	51
Blisset v. Daniel (1853), 10 Hare, 493 (68 E. R.; 19 R. C. 517)	403
Blyth v. Birmingham Waterworks Commrs. (1856), 25 L. J. Ex. 212; 11 Ex. 781; 2 Jur. (N. S.) 333 (18 R. C. 621)	50
Bold Buccleugh, The (1850, 1851), 7 Moo. P. C. 267 (13 E. R.; 24 R. C. 588)	320
Bonbonus, <i>Ex parte</i> (1803), 8 Ves. 840 (32 E. R.)	400
Bond v. Gibson (1808), 1 Camp. 185	400
Bond v. Gonsales (1704), 2 Salk. 445	375
Bond v. Nutt (1777), 2 Cowp. 608	370
Boston Fruit Co. v. British & Foreign Marine Insur. Co. (1906), 75 L. J. K. B. 537; (1906), A. C. 336; 94 L. T. 806; 54 W. R. 557	368
Bouillon v. Lupton (1863), 33 L. J. C. P. 37; 15 C. B. (N. S.) 113; 10 Jur. (N. S.) 422; 8 L. T. 575; 11 W. R. 966 (14 R. C. 72)	368, 370
Bowden v. Vaughan (1809), 10 East, 415 (13 R. C. 533)	365
Bowen v. Hall (C. A. 1881), 50 L. J. Q. B. 305; 6 Q. B. D. 333; 44 L. T. 75; 29 W. R. 367; 45 J. P. 373 (1 R. C. 717).	95
Box v. Jubb (1879), 48 L. J. Ex. 417; 4 Ex. D. 76; 41 L. T. 97; 27 W. R. 415	420
Boydell v. Drummond (1809), 11 East, 142	344
Bradford v. Symondson (C. A. 1881), 50 L. J. Q. B. 582; 7 Q. B. D. 456; 45 L. T. 364; 30 W. R. 27 (14 R. C. 521)	384
Bradlaugh v. Newdigate (1883), 52 L. J. Q. B. 454; 11 Q. B. D. 1; 31 W. R. 792	521 n.
Bradlaugh v. R. (1878), 48 L. J. M. C. 5; 3 Q. B. D. 607	627
Brandao v. Burnett (1846), 12 Cl. & Fin. 787 (8 E. R.; 3 R. C. 592)	300
Brandt's (William), Sons & Co. v. Dunlop Rubber Co. (H. L. 1905), 74 L. J. K. B. 898; (1905), A. C. 454; 93 L. T. 495	268
Brett v. Beckwith (1857), 26 L. J. Ch. 130; 3 Jur. (N. S.) 31 (19 R. C. 808)	399
Brettel v. Williams (1849), 19 L. J. Ex. 121; 4 Ex. 623	400
Brice v. Bannister (C. A. 1870), 47 L. J. Q. B. 722; 3 Q. B. D. 569; 38 L. T. 739; 26 W. R. 670	268
Brinkley v. Att.-Gen. (1890), 59 L. J. P. & D. 51; 15 P. D. 76; 62 L. T. 691 (5 R. C. 841)	82
British Mutual Banking Co. v. Charnwood Forest Ry. Co. (C. A. 1887), 56 L. J. Q. B. 449; 18 Q. B. D. 714; 57 L. T. 833; 35 W. R. 590	95
Britton v. Great Western Cotton Co. (1872), 41 L. J. Ex. 99; L. R. 7 Ex. 130; 27 L. T. 125; 20 W. R. 525	421
Brook v. Brook (H. L. 1861), 9 H. L. Cas. 193; 4 L. T. 93; 7 Jur. (N. S.) 422; 9 W. R. 461 (11 E. R.; 5 R. C. 783)	82
Brown, James, Matter of (1864), 33 L. J. Q. B. 193	15
Brown v. Duncan (1829), 10 B. & C. 93	335
Brown v. Vigne (1810), 12 East, 283	367

Bruce (Lord Henry) <i>v.</i> Aileshury (Marquis of) (1892), 62 L. J. Ch. 95; (1892), A. C. 356; 67 L. T. 490; 41 W. R. 318	151
Bruce <i>v.</i> Jones (1863), 32 L. J. Ex. 132; 1 Hurl. & Colt. 769; 9 Jur. (N. S.) 628; 7 L. T. 748; 11 W. R. 371 (14 R. C. 489)	383
Bruce <i>v.</i> Ross (H. L.), April 14, 1788	335 n.
Bryant <i>v.</i> Foot (Ex. Ch. 1868), 37 L. J. Q. B. 217; 9 B. & Sm. 444; L. R. 3 Q. B. 497; 18 L. T. 587; 16 W. R. 808 (8 R. C. 275)	240
Bunn <i>v.</i> Guy (1803), 4 East, 190	332
Buonoparte, The (1865), 8 Moore P. C. 473 (14 E. R.)	252, 397
Burgess <i>v.</i> Burgess (1853), 22 L. J. Ch. 675; 3 De G. M. & G. 896; 17 Jur. 292 (43 E. R.); 25 R. C. 186)	235
Burnard <i>v.</i> Rodocauachi (H. L. 1882), 51 L. J. Q. B. 548; 7 App. Cas. 333; 47 L. T. 277; 31 W. R. 65	372
Burnett <i>v.</i> Kensington (1797), 7 T. R. 210 (14 R. C. 187)	371
Bushell's Case (1679), Vaughan, 135	452
Busk <i>v.</i> Royal Exchange Assur. Co. (1818), 2 B. & Ald. 73 (14 R. C. 332)	377
Caird <i>v.</i> Sime (H. L. Sc 1887), 57 L. J. P. C. 2; 12 App. Cas. 326; 57 L. T. 634; 36 W. R. 199	232
Calder <i>v.</i> Dobell (1871), 40 L. J. C. P. 224; L. R. 6 C. P. 483; 25 L. T. 123; 19 W. R. 409, 978 (2 R. C. 456)	392
Calder <i>v.</i> Halkett (1839), 3 Moo. P. C. 28 (13 E. R.)	432
Camden <i>v.</i> Cowley (1762), 1 W. Bl. 417 (14 R. C. 46)	368
Campbell <i>v.</i> Spottiswoode (1863), 32 L. J. Q. B. 185; 3 B. & S. 769; 9 Jur. (N. S.) 1069; 8 L. T. 201; 11 W. R. 569	434
Candler <i>v.</i> Candler (1821), Jacob, 225 (37 E. R.)	332
Canning <i>v.</i> Farquhar (C. A. 1886), 55 L. J. Q. B. 225; 16 Q. B. D. 727; 54 L. T. 350; 34 W. R. 423	364
Capital & Counties Bank <i>v.</i> Henty (H. L. 1882), 52 L. J. Q. B. 232; 7 App. Cas. 741; 47 L. T. 662; 31 W. R. 157; 47 J. P. 214	527
Card <i>v.</i> Hope (1824), 2 B. & C. 661 (24 R. C. 246)	332
Cargo Ex Argos (1873), L. R. 5 P. C. 134; 28 L. T. 745; 21 W. R. 707	397
Cargo Ex Hamburg (1863), 33 L. J. Adm. 116; 2 Moo. P. C. (N. S.) 289; 10 Jur. (N. S.) 600; 10 L. T. 206; 12 W. R. 628 (15 E. R.)	252, 397
Cargo Ex Laertes (1837), 56 L. J. P. 108; 12 P. D. 187; 57 L. T. 502; 36 W. R. 111	351
Carter <i>v.</i> Boehm (1765), 3 Burr. 1905 (13 R. C. 501)	365
Carter <i>v.</i> Silber (1892), 61 L. J. Ch. 401; (1892), 2 Ch. 278; 66 L. T. 473	330
Cary <i>v.</i> Longman (1801), 1 East, 353; 3 Esp. 273 (7 R. C. 78)	233
Case of Swans, Co. Rep. 17	220 n.
Casey, <i>In re</i> , Stewart <i>v.</i> Casey (1892), 61 L. J. Ch. 61; (1892), 1 Ch. 104; 66 L. T. 93; 40 W. R. 180	407, 410
Chamberlain <i>v.</i> Hazlewood (1839), 5 M. & W. 515	426
Chapleo <i>v.</i> Brunswick Benefit Building Society (C. A. 1881), 50 L. J. Q. B. 372; 6 Q. B. D. 696; 44 L. T. 449; 29 W. R. 529 (2 R. C. 366)	385
Chatterton <i>v.</i> Cave (H. L. 1878), 47 L. J. C. P. 545; 3 App. Cas. 483; 38 L. T. 397; 26 W. R. 498	233
Chatterton <i>v.</i> Secretary of State for India (1895), 64 L. J. Q. B. 677; (1895), 2 Q. B. 189; 72 L. T. 52	433
Chester <i>v.</i> Chester (1871), L. R. 12 Eq. 444; 19 W. R. 644	294
Chichester <i>v.</i> Hill (1883), 52 L. J. Q. B. 160; 48 L. T. 364; 31 W. R. 245	259, 585
Child <i>v.</i> Hearn (1874), 43 L. J. Ex. 100; L. R. 9 Ex. 176; 22 W. R. 864	421
Christie <i>v.</i> Griggs (1809), 2 Camp. 79	355
Christy <i>v.</i> Row (1808), 1 Taunt. 300	396
Clarke's Design, <i>Re</i> (C. A. 1896), 65 L. J. Ch. 629; (1896), 2 Ch. 38; 74 L. T. 631	237
Clason <i>v.</i> Simmonds (1741), 6 T. R. 533 n. (9 R. C. 384)	374

	PAGE
Cleather v. Twisden (C. A. 1884), 54 L. J. Ch. 408; 28 Ch. D. 340; 52 L. T. 330; 33 W. R. 435	401
Clydesdale Engineering Co. v. Don Jose, &c. (1905), 74 L. J. P. C. 1; (1905), A. C. 6; 91 L. T. 666	344
Cochrane v. Fisher (1834, 1835), 2 Cr. & M. 581; 1 Cr. M. & R. 809	370
Cochrane v. Moore (C. A. 1890), 59 L. J. Q. B. 377; 25 Q. B. D. 57; 63 L. T. 153; 38 W. R. 587 (12 R. C. 410)	245
Cocks v. Masterman (1829), 8 L. J. K. B. 77; 9 B. & C. 902 (21 R. C. 68)	414
Coghlan v. Cullaghams, 7 Ir. C. L. Rep. 291	92
Cohn v. Davidson (1877), 46 L. J. Q. B. 305; 2 Q. B. D. 455; 36 L. T. 244; 25 W. R. 369	350
Collen v. Wright (1857, 1858), 26 L. J. Q. B. 147; 27 L. J. Q. B. 215; 7 El. & Bl. 301; 8 El. & Bl. 647 (2 R. C. 484)	388, 415
Colls v. Home & Colonial Stores, Ltd. (1904), 73 L. J. Ch. 484; (1904), A. C. 179; 90 L. T. 687; 53 W. R. 30	104
Colonial Insur. Co. of New Zealand v. Adelaide, &c., Insur. Co. (1886), 56 L. J. P. C. 19; 12 App. Cas. 128; 56 L. T. 173; 35 W. R. 636	361
Colvin v. Newberry (1830, 1832), 7 Bing. 190; 1 Cl. & Fin. 293 (6 E. R.; 5 R. C. 609)	349
Combined Weighing, &c., Machine Co., <i>In re</i> (C. A. 1889), 59 L. J. Ch. 26; 43 Ch. D. 99; 61 L. T. 582; 38 W. R. 67	243
Cooke v. Collingridge (1822), 1 L. J. Ch. 74; Jacob, 607 (37 E. R.)	404
Cooke v. Eshelby (H. L. 1887), 56 L. J. Q. B. 505; 12 App. Cas. 271; 56 L. T. 673; 35 W. R. 629 (2 R. C. 390)	392
Cooper v. Macdonald (1878), 47 L. J. Ch. 373; 7 Ch. D. 288; 38 L. T. 191; 26 W. R. 377	78, 286
Cope v. Rowlands (1836), 2 M. & W. 149	335
Cory v. Burr (H. L. 1885), 52 L. J. Q. B. 657; 8 App. Cas. 393; 49 L. T. 78; 31 W. R. 894	378
Cotton v. Wood (1850), 29 L. J. C. P. 333; 8 C. B. (N. S.) 568; 7 Jur. (N. S.) 168	424
Couturier v. Hastie (1856), 25 L. J. Ex. 253; 5 H. L. Cas. 673; 2 Jur. (N. S.) 1241 (10 E. R.; 6 R. C. 204)	342
Cowley v. Cowley (H. L. 1901), 70 L. J. P. D. & A. 83; (1901), A. C. 450 38 n.	
Cox v. Hickman (H. L. 1860), 30 L. J. C. P. 125; 8 H. L. Cas. 268 (11 E. R.; 19 R. C. 323)	399
Coxhead v. Mullis (1878), 47 L. J. C. P. 761; 3 C. P. D. 439; 39 L. T. 349; 27 W. R. 136	330
Crawford's Case (1849), 18 L. J. Q. B. 225; 13 Q. B. 613; 13 Jur. 955	15
Crawshay v. Collins (1808), 15 Ves. 218 (33 E. R.; 19 R. C. 682)	405
Crawshay v. Maule (1818), 1 Swanst. 530 (36 E. R.; 19 R. C. 467)	402
Crowley v. Cohen (1832), 1 L. J. (N. S.) K. B. 158; 3 B. & Ad. 478 (13 R. C. 314)	361, 363
Cruise v. Hunter (1790), 2 Bro. C. C. 499 n. (29 E. R.)	85
Cundy v. Lindsey (1878), 47 L. J. Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406 (6 R. C. 211)	342
Cunningham v. Montgomerie (1879), 6 Rettie, 1333	412
Currie v. McKnight (1897), 66 L. J. P. C. 19; (1897), A. C. 97; 75 L. T. 457	320
Currie v. Misa (1875), 44 L. J. Ex. 94; L. R. 10 Ex. 153; 23 W. R. 450; (affirmed H. L. 1876), 1 App. Cas. 554; 45 L. J. Q. B. 852; 35 L. T. 414; 24 W. R. 1049 (4 R. C. 317)	406
Dalby v. India & London Life Assur. Co. (Ex. Ch. 1854), 24 L. J. C. P. 2; 15 C. B. 365; 18 Jur. 1024; 3 C. L. R. 61 (13 R. C. 383)	363
Dale v. Humphrey (Ex. Ch. 1858), 27 L. J. Q. B. 390; El. Bl. & El. 1004; 5 Jur. (N. S.) 191	391
Dalrymple v. Dalrymple (1811), 2 Hagg. Const. 54 (17 R. C. 11)	57
Dalton v. Angus (H. L. 1881), 50 L. J. Q. B. 689; 6 App. Cas. 740; 44 L. T. 844; 30 W. R. 191 (10 R. C. 98)	104, 192 n.

	PAGE
D'Angibau, <i>In re</i> : Andrews v. Andrews (C. A. 1880), 49 L. J. Ch. 756; 15 Ch. D. 228; 43 L. T. 135; 28 W. R. 930 (24 R. C. 164)	385
Darlaston Local Bd. v. L. & N. W. Ry. Co. (C. A. 1891), 63 L. J. Q. B. 826; (1894), 2 Q. B. 694; 71 L. T. 461; 43 W. R. 29	51
Davis v. Freethy (C. A. 1890), 59 L. J. Q. B. 318; 24 Q. B. D. 519	244
Dawkins v. Rokeby, Lord (H. L. 1875), 45 L. J. Q. B. 8; L. R. 7 H. L. 744; 33 L. T. 196; 23 W. R. 931 (9 R. C. 39)	432
Debenham v. Mellon (H. L. 1880), 50 L. J. Q. B. 155; 6 App. Cas. 24; 43 L. T. 673; 29 W. R. 141 (2 R. C. 441)	388
De Bussche v. Alt (C. A. 1878), 47 L. J. Ch. 381; 8 Ch. D. 286; 38 L. T. 370 (2 R. C. 283)	390, 391
De Geer v. Stone (1882), 52 L. J. Ch. 57; 22 Ch. D. 243; 47 L. T. 434; 31 W. R. 241	41
De Hahn v. Hartley (1786), 1 T. R. 343 (14 R. C. 171)	369
Dennis v. Whetham (1874), 43 L. J. Q. B. 129; L. R. 9 Q. B. 345; 30 L. T. 514; 22 W. R. 571	422
Dennistoun v. Lillie (1821), 2 Bligh, 202 (4 E. R.)	365
Denoon v. Home & Colonial Assur. Co. (1872), 41 L. J. C. P. 162; L. R. 7 C. P. 341; 26 L. T. 628	372
Derry v. Peek (H. L. 1889), 58 L. J. Ch. 864; 14 App. Cas. 337 (12 R. C. 250)	436
De Vanx v. Salvador (1836), 4 Ad. & El. 420 (14 R. C. 305)	376
De Wolf v. Archangel Maritime Bank, &c., Co. (1874), 43 L. J. Q. B. 147; L. R. 9 Q. B. 451; 39 L. T. 605; 22 W. R. 801 (13 R. C. 607)	365
Dickenson v. Jardine (1868), 37 L. J. C. P. 321; L. R. 3 C. P. 639; 18 L. T. 717; 16 W. R. 1169 (14 R. C. 431)	382
Dickinson v. Valpy (1829), 8 L. J. K. B. 51; 10 B. & C. 128 (19 R. C. 423)	399
Diggle v. Higgs (C. A. 1877), 46 L. J. Ex. 721; 2 Ex. D. 422; 37 L. T. 27; 25 W. R. 777 (6 R. C. 482)	334
Ditcham v. Worrall (1880), 49 L. J. C. P. 688; 5 C. P. D. 410; 43 L. T. 286; 29 W. R. 59; 44 J. P. 799	330
Dixon v. Sadler (1839, 1840), 9 L. J. (N. S.) Ex. 48; 5 M. & W. 405; affirmed 8 M. & W. 895 (14 R. C. 58)	368
Doe & Martin v. Watts (1797), 7 T. R. 83 (15 R. C. 446)	147
Doe d. Baker v. Coombes (1850), 19 L. J. C. P. 306; 9 C. B. 714 (16 R. C. 337)	180 "
Donald v. Suckling (1866), 35 L. J. Q. B. 232; L. R. 1 Q. B. 585; 12 Jur. (N. S.) 795; 14 L. T. 772; 15 W. R. 13; 7 B. & S. 783 (21 R. C. 301)	299
Dr. Hawkesworth's Voyage, Case of (1774), Loft. 775	233
Driscoll v. Bovill (1798), 1 Bos. & P. 313	375
Dudgeon v. Pembroke (H. L. 1877), 46 L. J. Ex. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499 (14 R. C. 105)	367, 369
Duncan v. Benson (1847, 1849), 17 L. J. Ex. 238; 18 L. J. Ex. 169; 1 Ex. 557; 3 Ex. 644; 12 Jur. 218	398
Dunlop v. Higgins (1852), 1 H. L. Cas. 381; 12 Jur. 295 (9 E. R.)	341
Earle v. Rowcroft (1806), 8 East, 126 (14 R. C. 345)	378
Eastmans Photo, &c., Co. v. Comptroller-General, &c. (H. L. 1898), 67 L. J. Ch. 628; (1898), A. C. 571; 79 L. T. 195 (25 R. C. 240)	237
Eastwood v. Kenyon (1840), 11 Ad. & El. 438 (6 R. C. 23)	407, 410
Ebsworth v. Alliance Marine Insur. Co. (1873), 42 L. J. C. P. 305; L. R. 8 C. P. 596; 29 L. T. 479 (13 R. C. 215)	362
Edmonds v. Peake (1813), 7 Beav. 239 (49 E. R.)	412
Edwards v. Carter (1893), 63 L. J. Ch. 100; (1893), A. C. 360; 69 L. T. 153; 58 J. P. 4	330
Egerton v. Brownlow, Earl (1853), 23 L. J. Ch. 348; 4 H. L. Cas. 1; 18 Jur. 71 (10 E. R.; 24 R. C. 118)	334
Elliot v. Wilson (H. L. 1776), 4 Brown, P. C. 470 (2 E. R.)	373

	PAGE
Elwes v. Maw (1802), 3 East, 45 <i>n.</i> (12 R. C. 193)	144
Emmens v. Pottle (C. A. 1885), 55 L. J. Q. B. 51; 16 Q. B. D. 354; 53 L. T. 808; 34 W. R. 116; 50 J. P. 228 (9 R. C. 32)	431
England v. Curling (1844), 8 Beav. 129 (50 E. R.; 19 R. C. 598)	404
Enoch v. Wylie (H. L. 1862), 31 L. J. Ch. 402; 10 H. L. Cas. 1; 8 Jur. (N. S.) 897; 6 L. T. 263; 10 W. R. 467 (11 E. R.; 2 R. C. 56)	282
Esposito v. Bowden (1857), 27 L. J. Q. B. 17; 7 El. & Bl. 763; 3 Jur. (N. S.) 1209 (24 R. C. 399)	43
Ex Hamburg Cargo (1863), 33 L. J. Adm. 116; 2 Moo. P. C. (N. S.) 289; 10 Jur. (N. S.) 600; 10 L. T. 206; 12 W. R. 628 (12 E. R.)	252, 397
Ex Laertes Cargo (1887), 56 L. J. P. 108; 12 P. D. 187; 57 L. T. 502; 36 W. R. 111	351
Fairlie v. Fenton (1870), 39 L. J. Ex. 107; L. R. 5 Ex. 169; 22 L. T. 373	391
Farnworth v. Hyde (Ex. Ch. 1866), 36 L. J. C. P. 33; L. R. 2 C. P. 204; 15 L. T. 395; 15 W. R. 340 (1 R. C. 27)	380
Faucus v. Sarsfield (1856), 25 L. J. Q. B. 249; 6 El. & Bl. 192; 2 Jur. (N. S.) 665	369
Featherstonhaugh v. Fenwick (1810), 17 Ves. 298 (34 E. R.; 19 R. C. 570)	403
Feise v. Aguilar (1811), 3 Taunt. 506	371
Feise v. Parkinson (1812), 4 Taunt. 640 (14 R. C. 530)	381
Fenton v. Clegg (1854), 23 L. J. Ex. 197; 9 Exch. 680; 2 C. L. R. 1014 (12 R. C. 1)	241
Fettiplace v. Gorges (1789), 1 Ves. Jr. 45 (30 E. R.)	286
Fines, Case of, Dyer, 2 b. pl. 1; Challis (2nd ed.), 278	130
Fisher v. Smith (H. L. 1878), 48 L. J. Ex. 411; 4 App. Cas. 1; 39 L. T. 430; 27 W. R. 113	392
Fleming v. Smith (H. L. 1846), 1 H. L. Cas. 513 (9 E. R.; 1 R. C. 37)	380
Fletcher v. Rylands (H. L. 1868), 35 L. J. Ex. 154; L. R. 1 Ex. 265; 37 L. J. Ex. 161; L. R. 3 H. L. 330; 14 L. T. 523; 19 L. T. 220; 14 W. R. 799 (1 R. C. 235)	418
Flint v. Flemyng (1830), 8 L. J. K. B. 350; 1 B. & Ad. 45 (13 R. C. 693)	362
Floyd v. Barker (1608), 12 Co. Rep. 24 (15 R. C. 37)	432
Forbes v. Aspinall (1811), 13 East, 323 (13 R. C. 673)	367, 372
Foster v. Bates (1843), 13 L. J. Ex. 88; 12 M. & W. 226 (2 R. C. 129)	241
Fox, <i>Ex parte</i> (1793), 5 T. R. 276	45
Freeman v. East India Co. (1822), 5 B. & Ald. 617 (2 R. C. 535)	398
Fremantle v. L. & N. W. Ry. Co. (1861), 31 L. J. C. P. 12; 10 C. B. (N. S.) 89; 9 W. R. 611; s.c. at <i>nisi prius</i> , 2 F. & F. 337	50
Furtado v. Rogers (1802), 3 Bos. & P. 191 (14 R. C. 125)	333
Garbarron v. Kreft (1875), 44 L. J. Ex. 238; L. R. 10 Ex. 274; 33 L. T. 365; 24 W. R. 146	261
Gardner v. L. C. & D. Ry. Co. (1837), 36 L. J. Ch. 323; L. R. 2 Ch. 201; 15 L. T. 552; 15 W. R. 324 (7 R. C. 409)	51
Geddis v. Bann Reservoir, Prop. of (H. L. 1878), 3 App. Cas. 430	50, 423
Gellar, <i>Ex parte</i> (1814), 1 Rose, 297	400
General Steam Nav. Co. v. British, &c., Co. (1869), 38 L. J. Ex. 97; L. R. 4 Ex. 238; 20 L. T. 581; 17 W. R. 741 (19 R. C. 208)	425
Giblin v. M'Mullen (1869), 38 L. J. P. C. 25; L. R. 2 P. C. 318; 21 L. T. 214; 17 W. R. 445 (3 R. C. 613)	338
Gibson v. Bradford (1855), 24 L. J. Q. B. 159; 3 El. & Bl. 516; 1 Jur. (N. S.) 520	363
Gibson v. Small (H. L. 1853), 4 H. L. Cas. 353; 1 C. L. R. 363; 17 Jur. 1131 (10 E. R.; 14 R. C. 86)	369
Giles v. Grover (H. L. 1832), 1 Cl. & Fin. 72; 2 M. & Scott, 197; 9 Bing. 128 (6 E. R.; 11 R. C. 549)	262

	PAGE
<i>Ginnett v. Whittingham</i> (1886), 55 L. J. Q. B. 409; 16 Q. B. D. 761; 34 W. R. 565	445
<i>Glendarroch, The</i> (C. A. 1894), 63 L. J. P. 89; (1891), P. 226; 70 L. T. 344 (24 R. C. 385)	352
<i>Glenfruin, The</i> (1885), 54 L. J. P. 49; 10 P. D. 103; 52 L. T. 769; 33 W. R. 826	351
<i>Goldsmid v. Gillies</i> (1813), 4 Taunt. 803	371
<i>Gorgier v. Mieville</i> (1824), 2 L. J. K. B. 206; 3 B. & C. 45 (5 R. C. 198)	259
<i>Goss v. Withers</i> (1758), 2 Burr. 683 (1 R. C. 1)	380
<i>Gould v. Oliver</i> (1837), 7 L. J. (N. S.) C. P. 68; 4 Bing. N. C. 134 (14 R. C. 400)	381
<i>Grace v. Newman</i> (1875), 44 L. J. Ch. 298; L. R. 19 Eq. 623; 23 W. R. 517 (7 R. C. 86)	233
<i>Gratitudine, The</i> (1801), 3 Ch. Rob. 237 (24 R. C. 277)	252, 253, 397, 398
<i>Graves v. Weld</i> (1833), 2 L. J. (N. S.) K. B. 176; 2 B. & Adol. 105 (10 R. C. 383)	144
<i>Greeu v. Beesley</i> (1835), 4 L. J. (N. S.) C. P. 299; 2 Bing. N. C. 108 (19 R. C. 308)	399
<i>Grill v. General Iron Screw Colliery Co.</i> (1866, Ex. Ch. 1868), 35 L. J. C. P. 121; L. R. 1 C. P. 600; 12 Jur. (N. S.) 727; 14 W. R. 893; (affirmed) 37 L. J. C. P. 205; L. R. 3 C. P. 476; 18 L. T. 485; 16 W. R. 796 (4 R. C. 680)	352, 378
<i>Grinnell v. Wells</i> (1845), 14 L. J. C. P. 19; 7 M. & Gr. 1033; 8 Scott, N. R. 741; 2 D. & L. 610; 8 Jur. 1101	95
<i>Gunn v. Roberts</i> (1874), 43 L. J. C. P. 233; L. R. 9 C. P. 331; 30 L. T. 424; 22 W. R. 652	396
<i>Guy v. Churchill</i> (1888), 58 L. J. Ch. 345; 40 Ch. D. 481	334
<i>Gyles v. Wilcox</i> (1740), 2 Atk. 141 (26 E. R.; 7 R. C. 94)	233
<i>Hadley v. Taylor</i> (1865), L. R. 1 C. P. 53; 11 Jur. (N. S.) 979; 13 L. T. 368; 14 W. R. 59	549
<i>Hales</i> (Sir James), Case of, Plowden, 262	238 n.
<i>Hamburg, Cargo Ex</i> (1863), 33 L. J. Adm. 116; 2 Moo. P. C. (N. S.) 289; 10 Jur. (N. S.) 600; 10 L. T. 206; 12 W. R. 628 (15 E. R.)	252, 397
<i>Hamilton v. Mendez</i> (1761), 2 Burr. 1198 (1 R. C. 112)	380
<i>Hammach v. White</i> (1862), 31 L. J. C. P. 129; 11 C. B. (N. S.) 583; 8 Jur. (N. S.) 796; 5 L. T. 676; 10 W. R. 230	424
<i>Hammersmith Ry. Co. v. Brand</i> (H. L. 1869), 38 L. J. Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12 (1 R. C. 623)	50, 423
<i>Hammond v. Reid</i> (1820), 4 B. & Ald. 72 (9 R. C. 365)	374
<i>Hanbury v. Jenkins</i> (1901), 70 L. J. Ch. 730; (1901), 2 Ch. 401; 49 W. R. 615	107 n.
<i>Hancock</i> (falsely called Peaty) <i>v.</i> Peaty (1867), 36 L. J. P. M. & D. 57; L. R. 1 P. & D. 335	56
<i>Hanfstaengl Art Publishing Co. v. Holloway</i> (1893), 62 L. J. Q. B. 347; (1893), 2 Q. B. 1; 68 L. T. 676 (7 R. C. 134)	234
<i>Hanson v. Stubbs</i> ; <i>Re Stubbs' Estate</i> (1878), 47 L. J. Ch. 671; 8 Ch. D. 154; 26 W. R. 736 (2 R. C. 203)	290
<i>Harding</i> , In the goods of (1872), 41 L. J. P. & M. 65; L. R. 2 P. & D. 394; 26 L. T. 668; 20 W. R. 615	286
<i>Hare v. Travis</i> (1827), 5 L. J. K. B. 343; 7 B. & C. 14 (9 R. C. 357)	373
<i>Harman v. Johnson</i> (1853), 22 L. J. Q. B. 297; 2 El. & Bl. 61; 17 Jur. 1096; 3 C. & R. 272	401
<i>Harman v. Kingston</i> (1811), 3 Camp. 150 (14 R. C. 232)	372
<i>Harris v. Scaramanga</i> (1872), 41 L. J. C. P. 170; L. R. 7 C. P. 481; 26 L. T. 797; 20 W. R. 777	382
<i>Harrison v. Bank of Australasia</i> (1872), 41 L. J. Ex. 36; L. R. 7 Ex. 36; 25 L. T. 944; 20 W. R. 385	381
<i>Harrison v. Rutland, Duke of</i> (1893), 62 L. J. Q. B. 117; (1893), 1 Q. B. 142; 68 L. T. 35; 41 W. R. 322 (12 R. C. 582)	111

	PAGE
Hartley v. Buggin (1781), 3 Douglas, 39 (9 R. C. 390).	374
Harvey, <i>In re</i> ; Phillips, <i>Ex parte</i> (C. A. 1888), 36 W. R. 567	334
Harvey v. Farnie (H. L. 1882), 52 L. J. P. D. & A. 33; 8 App. Cas. 43; 48 L. T. 273; 31 W. R. 433 (5 R. C. 703)	82
Harvey v. Farquhar (H. L. 1872), 10 Macph. H. L. 26; Paterson, 1992	70
Hawkesworth v. Newberry (1774), Loftt, 775 (7 R. C. 94)	233
Hawthorn Corporation v. Kannuluik (1906), 75 L. J. P. C. 7; (1906), A. C. 105; 93 L. T. 644; 54 W. R. 285	423
Heaven v. Pender (C. A. 1883), 52 L. J. Q. B. 702; 11 Q. B. D. 503; 49 L. T. 357; 47 J. P. 709 (19 R. C. 81)	422
Hemmings v. Gasson (1858), 27 L. J. Q. B. 252; El. Bl. & El. 346; 4 Jur. (N. S.) 834 (9 R. C. 55)	433
Heyman v. Parish (1809), 2 Camp. 149	379
Hill v. Scott (1895), 64 L. J. Q. B. 635; (1895), 2 Q. B. 371; affirmed (C. A.), 65 L. J. Q. B. 87; (1895), 2 Q. B. 713; 73 L. T. 458	361
Hollins v. Fowler (1875), 44 L. J. Q. B. 169; L. R. 7 H. L. 757; 33 L. T. 73 (2 R. C. 409)	387
Hollins v. Verney (C. A. 1884), 53 L. J. Q. B. 430; 13 Q. B. D. 304; 51 L. T. 753; 33 W. R. 5 (10 R. C. 80)	192 n.
Holmes v. Mather (1875), 44 L. J. Ex. 176; L. R. 10 Ex. 261; 33 L. T. 361; 23 W. R. 364	424
Holroyd v. Marshall (H. L. 1862), 33 L. J. Ch. 193; 10 H. L. Cas. 191; 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171 (11 E. R.; 10 R. C. 426)	268
Hope v. Hope (1892), 61 L. J. Ch. 441; (1892), 2 Ch. 336; 66 L. T. 522; 40 W. R. 522	78, 287
Horney v. Lushington (1811), 15 East, 46; 3 Camp. 85 (13 R. C. 637)	366
Horwood v. Smith (1788), 2 T. R. 750 (23 R. C. 243)	259
Houlden v. Smith (1850), 19 L. J. Q. B. 170; 14 Q. B. 841; 14 Jur. 598	432
Household Fire Insur. Co. v. Grant (1879), 48 L. J. Ex. 577; 4 Ex. D. 216; 41 L. T. 298; 27 W. R. 858 (6 R. C. 115)	341
Humphrey v. Dale (1857), 26 L. J. Q. B. 137; 7 El. & Bl. 266	391
Humphries v. Cousins (1877), 46 L. J. C. P. 438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371	417
Hunt v. Great Northern Ry. Co. (1891), 60 L. J. Q. B. 498; (1891), 2 Q. B. 190; 55 J. P. 648	433
Hunter v. Parker (1840), 10 L. J. Ex. 281; 7 M. & W. 344	385
Hurry v. Royal Exchange Assur. Co. (1801), 2 Bos. & P. 430 (13 R. C. 620)	366
Hussey v. Horne-Payne (1879), 48 L. J. Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 585 (6 R. C. 155)	341
Hutley v. Hutley (1873), 42 L. J. Q. B. 52; L. R. 8 Q. B. 112; 28 L. T. 63; 21 W. R. 479	334
Hydarnes Steamship Co. v. Indemnity Mutual Insur. Co. (C. A. 1895), 64 L. J. Q. B. 353; (1895), 1 Q. B. 500; 72 L. T. 103	367
Hyde v. Hyde (1866), 35 L. J. P. & M. 57; L. R. 1 P. & D. 130; 14 L. T. 188; 14 W. R. 517 (5 R. C. 833)	55, 82
Hyde v. Wrench (1840), 3 Beav. 334; 4 Jur. 1106 (49 E. R.; 6 R. C. 139)	341
Illingworth v. Houldsworth (1904), 73 L. J. Ch. 739; (1904), A. C. 355; 91 L. T. 602; 53 W. R. 113	269
Indermaur v. Dames (1866, 1867), 35 L. J. C. P. 184; 36 L. J. C. P. 181; L. R. 1 C. P. 274; L. R. 2 C. P. 311; 14 L. T. 484; 16 L. T. 293; 14 W. R. 586; 15 W. R. 434 (19 R. C. 64)	422
Inglis v. Stock (H. L. 1885), 54 L. J. Q. B. 582; 10 App. Cas. 263; 52 L. T. 821; 33 W. R. 877 (13 R. C. 366)	361
Ionides v. Pacific Fire, &c., Insur. Co. (1871), 41 L. J. Q. B. 33; 41 L. J. Q. B. 190; L. R. 6 Q. B. 674; L. R. 7 Q. B. 517; 25 L. T. 490; 26 L. T. 738; 21 W. R. 22 (13 R. C. 467)	364
Ionides v. Pender (1874), 43 L. J. Q. B. 227; L. R. 9 Q. B. 531; 30 L. T. 547; 22 W. R. 884	372

	PAGE
Ionides v. Universal Marine Assoc. (1863), 32 L. J. C. P. 170; 14 C. B. (N. S.) 259; 10 Jur. (N. S.) 18; 8 L. T. 705; 11 W. R. 858 (14 R. C. 271)	376
Ireland v. Livingstone (1872), 41 L. J. Q. B. 201; L. R. 5 H. L. 406; 27 L. T. 79	389
Irons v. Smallpiece (1819), 2 B. & Ald. 551 (12 R. C. 408)	245
Irving v. Manning (1847), 1 H. L. Cas. 287; 6 C. B. 391 (9 E. R.); 1 R. C. 23	371, 380
Isaac v. King (July, 1877), <i>unreported</i>	413
Jackson v. Union Maine Insur. Co. (1873, 1874), 42 L. J. C. P. 284; 44 L. J. C. P. 27; L. R. 8 C. P. 572; L. R. 10 C. P. 125; 31 L. T. 789; 23 W. R. 169 (5 R. C. 650)	350
Jeffreys v. Boosey (H. L. 1854), 24 L. J. Ex. 81; 4 H. L. Cas. 815; 3 C. L. R. 625; 1 Jur. (N. S.) 615 (10 E. R.)	228
Jenkins v. Morris (C. A. 1880), 14 Ch. D. 674; 42 L. T. 817	331
Jenks v. Turpin (1884), 53 L. J. M. C. 161; 13 Q. B. D. 505; 50 L. T. 808; 49 J. P. 20	552, 554
Joel v. Morison (1834), 6 Car. & P. 50	95
Johnston v. Consumers Gas Co. of Toronto (1898), 67 L. J. P. C. 33; (1898), A. C. 447	421
Johnstone v. Marks (1887), 57 L. J. Q. B. 6; 19 Q. B. D. 509; 35 W. R. 806	330
Jolly v. Kine (1907), 76 L. J. Ch. 1; (1907), A. C. 1; 96 L. T. 656	104 n.
Jones v. Festiniog Ry. Co. (1868), 37 L. J. Q. B. 214; L. R. 3 Q. B. 733; 18 L. T. 902; 17 W. R. 28; 9 B. & S. 835	417
Jones v. Williams; Williams, <i>In re</i> (1887), 57 L. J. Ch. 264; 36 Ch. D. 573; 57 L. T. 756; 36 W. R. 34	290
Karnak, The (1869), 38 L. J. Adm. 57; L. R. 2 P. C. 505; 21 L. T. 159; 17 W. R. 1028	254, 398
Kearney v. London, Brighton & South Coast Ry. Co. (1870, 1871), 39 L. J. Q. B. 200; 40 L. J. Q. B. 285; L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; 22 L. T. 886; 24 L. T. 913; 18 W. R. 1000; 20 W. R. 24 (19 R. C. 1)	416
Kearsley v. Thompson (1890), 59 L. J. Q. B. 288; 21 Q. B. D. 742; 63 L. T. 150; 38 W. R. 614	334
Keilway v. Keilway (1726), 2 P. Wms. 344 (24 E. R.)	296
Kelly v. Morris (1866), 35 L. J. Ch. 423; L. R. 1 Eq. 697; 14 L. T. 222; 14 W. R. 496 (7 R. C. 102)	234
Kidston v. Empire Marine Insur. Co. (1866, 1867), 33 L. J. C. P. 156; L. R. 1 C. P. 535; L. R. 2 C. P. 357; 16 L. T. 119; 15 W. R. 769 (14 R. C. 247)	373
King v. R. (1897), 61 J. P. 663	628
Kingston v. Knibbs (1758), 1 Camp. 508 n.	368
Kirk v. Gregory (Ex. Ch. 1879), 45 L. J. Ex. 186; 1 Ex. D. 55; 34 L. T. 488; 24 W. R. 614 (25 R. C. 173)	411
Knight v. Wedderburn (1775), Morr. Dict. of Decisions, <i> voce</i> "Slave," vol. 33, p. 545 <i>et seq.</i>	122 n.
Knowles, <i>Re</i> ; <i>Roose v. Chalk</i> (1880), 49 L. J. Ch. 625; 43 L. T. 152; 28 W. R. 975	294
Kopitoff v. Wilson (1876), 45 L. J. Q. B. 436; 1 Q. B. D. 377; 34 L. T. 677; 24 W. R. 706	350
Koster v. Reed (1826), 6 B. & C. 19 (14 R. C. 359)	379
Laertes, Cargo Ex (1887), 56 L. J. P. 108; 12 P. D. 187; 57 L. T. 502; 36 W. R. 111	351
Lambert's Estate, <i>In re</i> ; <i>Stanton v. Lambert</i> (1888), 57 L. J. Ch. 927; 39 Ch. D. 626; 59 L. T. 429	78, 286
Lampleigh v. Braithwait, 1 Smith's Lead. Cas. 67	410

	PAGE
Latham v. Atwood, Cro. Car. 515	144
Lautour v. Teesdale (1816), 8 Taunt. 830; 2 Marsh. 243 (12 R. C. 729)	58
Lawrence v. Aberdeen (1821), 5 B. & Ald. 107 (14 R. C. 296)	377
Lawrence v. Jenkins (1873), 42 L. J. Q. B. 147; L. R. 8 Q. B. 274; 28 L. T. 406; 21 W. R. 577	421
Lawrence v. Sydebotham (1805), 6 East, 45 (9 R. C. 402)	375
Laythoarp v. Bryant (1836), 5 L. J. (N. S.) C. P. 217; 2 Bing. N. C. 735; 3 Scott. 238; 2 Hodges, 25 (6 R. C. 230)	344
Leese v. Martin (1873), 43 L. J. Ch. 143; L. R. 17 Eq. 224; 29 L. T. 742; 22 W. R. 230	301
Lennox v. Stoddart (C. A. 1902), 71 L. J. K. B. 747; (1902), 2 K. B. 21; 87 L. T. 283	556
Lepanto, The (1892), P. 122; 66 L. T. 623 (24 R. C. 576)	410
Lester, <i>Ex parte</i> ; Lynes, <i>In re</i> (C. A. 1893), 62 L. J. Q. B. 372; (1893), 2 Q. B. 113; 68 L. T. 739; 41 W. R. 488	270
Lewis v. Rucker (1761), 2 Burr. 1167 (14 R. C. 215)	371
Limpus v. General Omnibus Co. (1862), 32 L. J. Ex. 34; 1 Hurl. & Coll. 526; 9 Jur. (N. S.) 333 (17 R. C. 258)	94
Lindsay v. Cundy (1876), 45 L. J. Q. B. 381; 46 L. J. Q. B. 233; 1 Q. B. D. 348; 2 Q. B. D. 96; 34 L. T. 314; 36 L. T. 345; 21 W. R. 730; 25 W. R. 417; s.c. 3 App. Cas. 459; 47 L. J. Q. B. 481; 38 L. T. 573; 26 W. R. 406 (6 R. C. 211)	259
Litt v. Cowley (1816), 7 Taunt. 169 (23 R. C. 411)	301
Lizzie, The (1868), L. R. 2 Adm. 254; 19 L. T. 71	397
Lloyd v. Freshfield (1826), 2 C. & P. 325	400
Lloyd v. Guibert (Ex. Ch. 1865), 35 L. J. Q. B. 74; L. R. 1 Q. B. 115; 6 B. & S. 100; 13 L. T. 602 (5 R. C. 870)	254
Lloyd v. Harrison (Ex. Ch. 1866), 35 L. J. Q. B. 153; L. R. 1 Q. B. 502; 12 Jur. (N. S.) 701; 14 L. T. 799; 14 W. R. 737; 6 B. & S. 36	422
Lockhart v. Henderson (1799), Morr. Dict. Appendix, Adultery, No. 1	70
London & River Plate Bank v. Bank of Liverpool (1896), 65 L. J. Q. B. 80; (1896), 1 Q. B. 7; 73 L. T. 473 (21 R. C. 73)	414
London County Council, <i>Ex parte</i> (1892), 61 L. J. Q. B. 27; (1892), 1 Q. B. 33; 65 L. T. 625	40
London Joint Stock Bank v. Simmons (1892), 61 L. J. Ch. 723; (1892), A. C. 201; 66 L. T. 625; 41 W. R. 108	260
London Steamship Owners Insur. Assoc. v. Grampian S.S. Co. (C. A. 1890), 59 L. J. Q. B. 549; 24 Q. B. D. 663	377
Longworth v. Yelverton (Yelverton's Case), Court of Session, 3rd Series, vol. i., p. 461	62
Lound v. Grimwade (1888), 57 L. J. Ch. 725; 39 Ch. D. 605; 59 L. T. 168	332, 334
Lovell v. Beauchamp (H. L. 1894), 63 L. J. Q. B. 802; (1894), A. C. 607; 71 L. T. 587; 43 W. R. 129	270
Lowry v. Bourdieu (1780), 2 Dougl. 468 (14 R. C. 533)	384
Lucena v. Crauford (1802-1806), 3 Bos. & P. 75; 2 Bos. & P. (N. R.) 269; 1 Taunt. 325 (13 R. C. 150)	359
Lumley v. Gye (1853), 22 L. J. Q. B. 463; 2 El. & Bl. 216; 17 Jur. 827 (1 R. C. 707)	95
Lunt v. London & North-Western Ry. Co. (1866), 35 L. J. Q. B. 105; L. R. 1 Q. B. 277; 12 Jur. (N. S.) 409; 14 L. T. 225; 14 W. R. 497	424
Lupton v. White (1808), 15 Ves. 432 (33 E. R.)	228
Lynes, <i>In re</i> ; Lester, <i>Ex parte</i> (C. A. 1893), 62 L. J. Q. B. 372; (1893), 2 Q. B. 113; 68 L. T. 739; 41 W. R. 488	270
Lyons v. Blenkin (1821), Jacob, 245 (37 E. R.)	85
Maas v. Pepper (1905), 74 L. J. K. B. 452; (1905), A. C. 102; 92 L. T. 371; 53 W. R. 513	307 n.
MacCartney v. Londonderry, &c., Ry. Co. (1904), 73 L. J. P. C. 73; (1904), A. C. 301; 91 L. T. 105	103

	PAGE
McConnell <i>v.</i> Hector (1802), 3 Bos. & P. 113	43
Maddowall <i>v.</i> Fraser (1779), 1 Dougl. 259	365
McGrath, <i>In re</i> (C. A. 1893), 62 L. J. Ch. 208; (1893), 1 Ch. 143; 67 L. T. 636; 41 W. R. 97	89
Mackay, <i>Ex parte</i> (1873), 42 L. J. Bank. 68; L. R. 8 Ch. 643; 28 L. T. 828; 21 W. R. 664	334
Mackenzie <i>v.</i> Hawke (1902), 71 L. J. K. B. 561; (1902), 2 K. B. 216; 87 L. T. 122	556
McKenzie <i>v.</i> Stuart, Dom. Proc., March 13, 1774	207 n.
Macklin <i>v.</i> Richardson (1770), Ambler, 694 (27 E. R.; 7 R. C. 66)	228
McLean and Hope <i>v.</i> Fleming (1871), L. R. 2 H. L. (Sc.) 128; 25 L. T. 317 (4 R. C. 665)	351
Macleay <i>v.</i> Tait (1906), 75 L. J. Ch. 90; (1906), A. C. 24; 94 L. T. 68; 54 W. R. 365	436
McLeod <i>v.</i> St. Aubyn (1899), 68 L. J. P. C. 137; (1899), A. C. 549; 81 L. T. 158; 48 W. R. 173	523
Macmillan <i>v.</i> Dent (1906), 75 L. J. Ch. 99; (1906), 1 Ch. 101; 94 L. T. 84; 54 W. R. 262	230
M'Swiney <i>v.</i> Royal Exchange Assur. Co. (1850), 18 L. J. Q. B. 193; 19 L. J. Q. B. 222; 14 Q. B. 634 (13 R. C. 279)	362
Malcomson <i>v.</i> O'Dea (1862), 10 H. L. Cas. 593; 9 L. T. 93; 12 W. R. 178; 9 Jur. (N. S.) 1135 (11 E. R.; 12 R. C. 169)	107 n.
Manzoni <i>v.</i> Douglas (1880), 50 L. J. Q. B. 289; 6 Q. B. D. 145; 29 W. R. 425; 45 J. P. 391	424
Marks <i>v.</i> Frogley (1898), 67 L. J. Q. B. 605; (1898), 1 Q. B. 888; 78 L. T. 607; 46 W. R. 548	574
Marpesia, The (1872), L. R. 4 P. C. 212; 26 L. T. 333; 8 Moore, P. C. (N. S.) 468 (17 E. R.)	424
Marsden <i>v.</i> City & County Insur. Co. (1865), 35 L. J. C. P. 60; L. R. 1 C. P. 232; 12 Jur. (N. S.) 76; 13 L. T. 465; 14 W. R. 106; 1 H. & R. 53	378
Martin <i>v.</i> Fitzgibbon (C. A. 1881), 50 L. J. Ch. 394; 17 Ch. D. 454; 44 L. T. 562; 29 W. R. 551 (6 R. C. 56)	331
May <i>v.</i> Burdett (1846), 16 L. J. Q. B. 64; 9 Q. B. 101; 10 Jur. 692 (3 R. C. 108)	416
Meakin <i>v.</i> Morris (1884), 53 L. J. M. C. 73; 12 Q. B. D. 352; 32 W. R. 661; 48 J. P. 344	92
Medina, The (1876), 45 L. J. Adm. 81; 1 P. D. 272; 2 P. D. 5; 35 L. T. 779; 25 W. R. 156 (24 R. C. 576)	410
Merivale <i>v.</i> Carson (1887), 20 Q. B. D. 275; 58 L. T. 331; 36 W. R. 231	434
Mersey Dock, &c., Trustees <i>v.</i> Gibbs (H. L. 1866), 35 L. J. Ex. 225; L. R. 1 H. L. 93; 12 Jur. (N. S.) 571; 14 L. T. 677; 14 W. R. 872	412, 423
Mildmays (Sir A.), Case of, 6 Co. Rep. 40a	132
Mines, Case of; R. <i>v.</i> Earl of Northumberland (10 Eliz. Hil. T.), Plowden, 310 (17 R. C. 393)	99
Moir <i>v.</i> Royal Exchange Assur. Co. (1815), 3 M. & S. 461	369
Mollett <i>v.</i> Robinson (1872), 41 L. J. C. P. 65; L. R. 7 C. P. 84; 26 L. T. 207; 20 W. R. 544; reversed 44 L. J. C. P. 362; L. R. 7 H. L. 802; 33 L. T. 544	390
Molton <i>v.</i> Camroux (Ex. Ch. 1849), 17 L. J. Ex. 68; 18 L. J. Ex. 356; 2 Exch. 487; 4 Exch. 17; 12 Jur. 800 (6 R. C. 71)	331
Moore <i>v.</i> Knight (1891), 60 L. J. Ch. 271; (1891), 1 Ch. 547; 63 L. T. 831; 39 W. R. 312	401
Morse <i>v.</i> Wilson (1791), 4 T. R. 353	357
Mottoux <i>v.</i> London Assur. Co. (1739), 1 Atk. 545 (26 E. R.; 13 R. C. 467)	364
Mounsey <i>v.</i> Ismay (1865), 34 L. J. Fx. 52; 3 Hurl. & Colt. 486; 11 Jur. (N. S.) 141 (8 R. C. 275)	240

	PAGE
Mount v. Larkins (1831), 1 L. J. (N. S.) C. P. 89; 8 Bing. 108 . . .	374
Mulcahy v. R. (1868), L. R. 3 H. L. 306 . . .	545
Munster v. Lamb (C. A. 1883), 52 L. J. Q. B. 726; 11 Q. B. D. 588; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805 (7 R. C. 714) . . .	432
Murfett v. Smith (1887), 56 L. J. P. 87; 12 P. D. 116; 57 L. T. 498; 35 W. R. 460 . . .	279
National Coffee Palace Co., <i>In re</i> ; Panmure, <i>Ex parte</i> (C. A. 1883), 53 L. J. Ch. 57; 24 Ch. D. 367; 32 W. R. 236 (2 R. C. 434) . . .	388, 415
Newberry v. Colvin (1830, 1832), 7 Bing. 190; 1 Cl. & Fin. 293 (6 E. R.; 5 R. C. 609) . . .	349
Newby v. Reed (1762), 1 Wm. Bl. 416 (14 R. C. 497) . . .	383
Newton, <i>In re</i> (C. A. 1896), 65 L. J. Ch. 641; (1896), 1 Ch. 740; 73 L. T. 692; 44 W. R. 470 . . .	85, 89
Nichols v. Marsland (C. A. 1876), 46 L. J. Ex. 174; 2 Ex. D. 1; 35 L. T. 725; 25 W. R. 173 (1 R. C. 262) . . .	419 <i>et seq.</i>
Nickalls v. Merry (1875), 45 L. J. Ch. 575; L. R. 7 H. L. 530; 32 L. T. 623; 23 W. R. 663 . . .	395
Nicoll v. Greaves (1864), 33 L. J. C. P. 259; 17 C. B. (N. S.) 27; 10 Jur. (N. S.) 919; 10 L. T. 531; 12 W. R. 961 . . .	91 <i>n.</i>
Nitro-phosphate, &c., Co. v. London & St. Katherine's Dock Co. (C. A. 1877), 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267 (1 R. C. 276) . . .	423
Nordenfelt v. Maxim-Nordenfelt Guns, &c., Co. (1894), 63 L. J. Ch. 908; (1894), A. C. 535; 71 L. T. 489 (6 R. C. 413) . . .	333
Norfolk (Earldom of) Peerage Claim (1907), 76 L. J. P. C. 9; (1907), A. C. 10 . . .	38
North British & Mercantile Co. v. London, Liverpool, &c., Co. (C. A. 1877), 46 L. J. Ch. 537; 5 Ch. D. 569; 36 L. T. 629 . . .	361
Northcote v. Doughty (1879), 4 C. P. D. 385 . . .	330
North-Eastern Railway Co. v. Wanless (Ex. Ch. 1874), 43 L. J. Q. B. 185; L. R. 7 H. L. 12; 30 L. T. 275; 22 W. R. 561; affirming L. R. 6 Q. B. 481; 25 L. T. 103 . . .	424
North of England Iron S.S. Insur. Co. v. Armstrong (1870), 39 L. J. Q. B. 81; L. R. 5 Q. B. 244; 21 L. T. 822; 18 W. R. 520 . . .	372
Northumberland Avenue Hotel Co., <i>In re</i> (C. A. 1883), 33 Ch. D. 16 (2 R. C. 315) . . .	386
Notara v. Henderson (1870), 39 L. J. Q. B. 167; L. R. 5 Q. B. 346; (affirmed Ex. Ch. 1872), 41 L. J. Q. B. 158; L. R. 7 Q. B. 225; 26 L. T. 442; 20 W. R. 442 . . .	396
Nottidge v. Jackson (C. A. 1883), 52 L. J. Q. B. 760; 11 Q. B. D. 627; 49 L. T. 339; 32 W. R. 106 . . .	233
Nourse v. Liverpool, &c., Assoc. (C. A. 1896), 65 L. J. Q. B. 507; (1896), 2 Q. B. 16; 74 L. T. 513; 44 W. R. 500 . . .	410
Nowlan v. Ahlett (1835), 2 Cr. M. & R. 54 . . .	91 <i>n.</i>
Nugent v. Smith (C. A. 1876), 45 L. J. C. P. 697; 1 C. P. D. 423; 34 L. T. 827; 25 W. R. 117 (1 R. C. 216) . . .	351
Ogg v. Shuter (1875), 45 L. J. C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100 (4 R. C. 746) . . .	260
Oliver v. Hunting (1890), 59 L. J. Ch. 255; 44 Ch. D. 205; 62 L. T. 108; 38 W. R. 618 . . .	344
Oliver v. Brightman (1846), 15 L. J. Q. B. 274; 8 Q. B. 781; 10 Jur. 875; 1 C. & K. 360 (13 R. C. 650) . . .	367
Olley v. Fisher (1886), 56 L. J. Ch. 208; 34 Ch. D. 367; 55 L. T. 807; 35 W. R. 301 . . .	343
Onward, The (1873), 42 L. J. Adm. 61; L. R. 4 Adm. 38; 28 L. T. 204; 21 W. R. 601 . . .	398
Oriental, The (1864), 7 Moo. P. C. 398 (13 E. R.) . . .	253
Paget v. Marshall (1885), 54 L. J. Ch. 575; 28 Ch. D. 255; 51 L. T. 351; 33 W. R. 608 . . .	343

	PAGE
Palliser v. Gurney (1887), 56 L. J. Q. B. 546; 19 Q. B. D. 519; 35 W. R. 760	76
Palmer v. Blackburn (1882), 1 Bing. 61 (14 R. C. 486)	383
Panmure, <i>Ex parte</i> ; National Coffee Palace Co., <i>In re</i> (C. A. 1883), 53 L. J. Ch. 57; 24 Ch. D. 367; 32 W. R. 236	388, 415
Parker v. Taswell (1858), 27 L. J. Ch. 812; 2 De G. & J. 559 (44 E. R.; 8 R. C. 612)	145, 206 n
Parkes v. Prescott (1869), 38 L. J. Ex. 105; L. R. 4 Ex. 169; 20 L. T. 537; 17 W. R. 773 (9 R. C. 16)	431
Parneter v. Cousins (1809), 2 Camp. 235 (13 R. C. 608)	365
Parniter v. Coupland (1840), 9 L. J. (N. S.) Ex. 202; 6 M. & W. 105; 4 Jur. 701	527 n.
Parnaby v. Lancaster Canal Co. (1838), 7 L. J. Q. B. 258; 11 Ad. & El. 223; 3 P. & D. 162	51
Partington v. Attorney-General (1869), 33 L. J. Ex. 281; L. R. 4 H. L. 100	286
Pasley v. Freeman (1789), 3 T. R. 51 (12 R. C. 235)	436
Pawson v. Watson (1778), 2 Cowp. 785 (13 R. C. 540)	365
Peacock v. Peacock (1809), 16 Ves. 49 (33 E. R.; 19 R. C. 548)	402
Peek v. North Staffordshire Ry. Co. (H. L. 1863), 32 L. J. Q. B. 241; 10 H. L. Cas. 473; 9 Jur. (N. S.) 914; 8 L. T. 768; 11 W. R. 1023 (11 E. R.)	354
Pecr v. Humfrey (1835), 4 L. J. (N. S.) K. B. 100; 2 Ad. & El. 495	259
Pelly v. Royal Exchange Assur. Co. (1757), Burr. 341 (14 R. C. 30)	367
Penton v. Robart (1801), 2 East, 88; 4 Esp. 33	144
Phillips, <i>Ex parte</i> ; Harvey, <i>In re</i> (C. A. 1888), 36 W. R. 567	334
Phillips v. Irving (1844), 13 L. J. C. P. 145; 7 M. & Gr. 325; 8 Scott, N. R. 3 (9 R. C. 396)	375
Pike v. Fitzgibbon (C. A. 1881), 50 L. J. Ch. 394; 17 Ch. D. 454; 44 L. T. 562; 29 W. R. 551 (6 R. C. 56)	331
Pike v. Nicholas (1869), 39 L. J. Ch. 435; L. R. 5 Ch. 251; 18 W. R. 321 (7 R. C. 108)	234
Pink v. Fleming (1890), 59 L. J. Q. B. 151; 25 Q. B. D. 396; 63 L. T. 413; 6 Asp. M. C. 554	377
Pitman v. Universal Marine Insur. Co. (C. A. 1882), 51 L. J. Q. B. 561; 9 Q. B. D. 192; 46 L. T. 863; 30 W. R. 906 (14 R. C. 462)	382
Potts v. Bell (1800), 8 T. R. 548 (13 R. C. 547)	333
Powdrell v. Jones (1854), 24 L. J. Ch. 123; 2 Sm. & Giff. 407; 18 Jur. 1111 (65 E. R.)	79
Powell v. Birmingham Vinegar Brewery Co. (1894), 63 L. J. Ch. 152; (1894), A. C. 8; 70 L. T. 1; 58 J. P. 206	236
Powell v. Gudgeon (1816), 5 M. & S. 431	377
Powell v. Kempton Park Racecourse Co. (1899), 68 L. J. Q. B. 392; (1899), A. C. 143; 80 L. T. 538; 47 W. R. 585	556
Powles v. Innes (1843), 12 L. J. Ex. 163; 11 M. & W. 10 (13 R. C. 356)	361
Preston v. Luck (1884), 27 Ch. D. 497; 33 W. R. 317	313
Price, <i>In re</i> ; Stafford v. Stafford (1885), 54 L. J. Ch. 509; 28 Ch. D. 709; 52 L. T. 430; 33 W. R. 20	77
Price v. Seeley (1843), 10 Cl. & Fin. 28 (8 E. R.)	607
Priestley v. Fowler (1837), 7 L. J. (N. S.) Ex. 42; 3 M. & W. 1; 1 Jur. 987 (19 R. C. 102)	93
Pritchett v. English & Colonial Syndicate (C. A. 1899), 68 L. J. Q. B. 801; (1899), 2 Q. B. 428; 81 L. T. 206; 47 W. R. 577	243
Pugh v. Golden Valley Ry. Co. (C. A. 1880), 40 L. J. Ch. 721; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863 (7 R. C. 474)	52
Quartz Hill, &c., Co. v. Beall (C. A. 1882), 51 L. J. Ch. 874; 20 Ch. D. 501; 46 L. T. 746; 30 W. R. 583	180 n.
Quinn v. Leatham (1901), 70 L. J. P. C. 76; (1901), A. C. 495; 85 L. T. 289; 50 W. R. 139	95, 545

	PAGE
<i>R. v. Adamson</i> (1875), 45 L. J. M. C. 46; 1 Q. B. D. 201; 38 L. T. 840; 24 W. R. 250 (15 R. C. 127)	668
<i>R. v. Aspinall</i> (1876), 46 L. J. M. C. 149; 2 Q. B. D. 48	627
<i>R. v. Berger</i> (1894), 63 L. J. Q. B. 529; (1894), 1 Q. B. 823; 70 L. T. 807; 42 W. R. 541	628
<i>R. v. Bexley Heath Ry. Co.</i> (C. A. 1896), 65 L. J. Q. B. 469; (1896), 2 Q. B. 74; 74 L. T. 540; 44 W. R. 501	112
<i>R. v. Bird</i> (1898), 62 J. P. 760; 15 T. L. R. 26 (C. C. R.)	610
<i>R. v. Birmingham & Gloucester Ry. Co.</i> (1840), 9 Car. & P. 469	599
<i>R. v. Bower</i> (1823), 1 L. J. K. B. 110; 1 B. & C. 585	515
<i>R. v. Bradlaugh</i> (1883), 15 Cox, C. C. 217	516
<i>R. v. Bristol Dock Co.</i> (1842), 2 Q. B. 64; 6 Jur. 216 (7 R. C. 449)	51
<i>R. v. Carden</i> (1880), 49 L. J. M. C. 1; 5 Q. B. D. 1; 41 L. T. 504; 28 W. R. 133; 44 J. P. 119; 14 Cox, C. C. 359	528
<i>R. v. Clerk of Assize of Oxford Circuit</i> (1897), 1 Q. B. 370; 18 Cox, 518	549
<i>R. v. Comptroller of Patents</i> (1899), 68 L. J. Q. B. 568; (1899), 1 Q. B. 909; 80 L. T. 777; 47 W. R. 567	627
<i>R. v. Cowle</i> , 2 Burr. 856	16 n.
<i>R. v. Crunden</i> (1809), 2 Camp. 89	550
<i>R. v. Frost</i> (1853), Dearsley, C. C. R. 474	612
<i>R. v. Gibson</i> (1887), 56 L. J. M. C. 49; 18 Q. B. D. 537; 56 L. T. 367; 35 W. R. 411; 16 C. C. 181	626
<i>R. v. Gray</i> (1900), 69 L. J. Q. B. 502; (1900), 2 Q. B. 36; 82 L. T. 534; 48 W. R. 474	523
<i>R. v. Great North of England Ry. Co.</i> (1846), 16 L. J. M. C. 16; 9 Q. B. 315; 10 Jur. 755 (7 R. C. 466)	52
<i>R. v. Great Western Ry. Co.</i> (C. A. 1893), 62 L. J. Q. B. 572; 69 L. T. 572	51
<i>R. v. Gregory</i> (1867), 36 L. J. M. C. 60; L. R. 1 C. C. R. 77; 16 L. T. 388; 15 W. R. 774; 10 Cox, C. C. 459	546
<i>R. v. Gynghall</i> (C. A. 1893), 62 L. J. Q. B. 559; (1893), 2 Q. B. 232; 69 L. T. 481; 57 J. P. 773	89
<i>R. v. Higgins</i> (1801), 2 East, 5	516
<i>R. v. Jubbs</i> (1776), Cowp. 517	45
<i>R. v. Lords of the Treasury</i> (1872), 41 L. J. Q. B. 178; L. R. 7 Q. B. 386; 26 L. T. 64; 20 W. R. 336	34
<i>R. v. Lynch</i> (1903), 72 L. J. K. B. 167; (1903), 1 K. B. 444; 88 L. T. 26; 51 W. R. 619	42
<i>R. v. Millis</i> (1834), 10 Cl. & Fin. 534; 8 Jur. 717 (8 E. R.; 17 R. C. 66)	57, 61
<i>R. v. Northumberland (Earl of): Case of Mines</i> (10 Eliz. Hil. T.), Plowden, 310 (17 R. C. 393)	99
<i>R. v. Picton</i> (1804), 30 St. Tr. 225	16 n.
<i>R. v. Platts</i> (1879), 48 L. J. Q. B. 848; 28 W. R. 915	629
<i>R. v. Price</i> (1884), 53 L. J. M. C. 51; 12 Q. B. D. 247; 33 W. R. 45 n.; 15 Cox, C. C. 389 (8 R. C. 467)	558
<i>R. v. Riley</i> (1896), 65 L. J. M. C. 74; (1896), 1 Q. B. 309; 74 L. T. 254; 44 W. R. 318	586
<i>R. v. Severn & Wye Ry. Co.</i> (1819), 2 B. & Ald. 646 (7 R. C. 445)	51
<i>R. v. Sharpe</i> (1856), 1 Dears. & B. 160	557
<i>R. v. Skinner</i> (1772), Loft. 55	432
<i>R. v. Stewart</i> (1841), 12 Ad. & El. 773	557
<i>R. v. Townsend</i> (1866), 4 Fost. & Fin. 1089	528
<i>R. v. Vann</i> (1852), 21 L. J. M. C. 39; 2 Dan. 325	557
<i>R. v. Wellard</i> (1884), 54 L. J. M. C. 14; 14 Q. B. D. 63; 51 L. T. 604; 33 W. R. 156; 49 J. P. 296	550
<i>R. v. Williams</i> (1884), 53 L. J. P. C. 64; 9 App. Cas. 418; 51 L. T. 546	423
<i>R. v. Woodrow</i> (1788), 2 T. R. 731	515
<i>Rabone v. Williams</i> (1785), 7 T. R. 360 n. (2 R. C. 391)	392

	PAGE
<i>Raffles v. Wichelhaus</i> (1864), 33 L. J. Ex. 160; 8 Hurl. & Colt. 906 (6 R. C. 198)	342
<i>Raue v. Bell</i> (1808), 9 East, 195 (9 R. C. 365)	374
<i>Rankin v. Potter</i> (H. L. 1873), 42 L. J. C. P. 169; L. R. 6 H. L. 83; 29 L. T. 142; 22 W. R. 1 (1 R. C. 70)	362, 280
<i>Read v. Royal Exchange Assur. Co.</i> (1795), 2 Peak, 70	363
<i>Readhead v. Midland Ry. Co.</i> (Ex. Ch. 1869), 38 L. J. Q. B. 169; L. R. 4 Q. B. 379; 17 W. R. 737 (5 R. C. 436)	355
<i>Reddaway v. Banham</i> (H. L. 1896), 65 L. J. Q. B. 381; (1896), A. C. 199 (25 R. C. 193)	235
<i>Reid v. Hollinshead</i> (1825), 4 B. & C. 867 (19 R. C. 411)	400
<i>Rich v. Parker</i> (1798), 7 T. R. 705 (14 R. C. 149)	369
<i>Richardson v. Hamilton</i> (Ch.), January 8, 1773	207 <i>n.</i>
<i>Richardson v. Stanton</i> (1872, 1874), 41 L. J. C. P. 180; 43 L. J. C. P. 230; L. R. 7 C. P. 421; L. R. 9 C. P. 390; 33 L. T. 193; 24 W. R. 324 (5 R. C. 632)	350
<i>Ridgway v. Wharton</i> (1858), 27 L. J. Ch. 46; 6 H. L. Cas. 238; 4 Jur. (N. S.) 173 (10 E. R.)	344
<i>River Wear Commissioners v. Adamson</i> (1877), 47 L. J. Q. B. 193; 2 App. Cas. 437; 37 L. T. 543 (1 R. C. 308)	420
<i>Roberts v. Eberhardt</i> (1853), Kay, 148 (69 E. R.); 19 R. C. 598)	404
<i>Robertson v. French</i> (1803), 4 East, 130 (14 R. C. 1)	367
<i>Robinson v. Duleep Singh</i> (C. A. 1879), 48 L. J. Ch. 758; 11 Ch. D. 798; 39 L. T. 313; 27 W. R. 21	105
<i>Robinson v. Fraser's Trustees</i> (1880), 7 Rettie, 707	413
<i>Robinson v. Mollett</i> (1872), 44 L. J. C. P. 362; L. R. 7 H. L. 802; 33 L. T. 544	391
<i>Roose v. Chalk; Knowles, Re</i> (1880), 49 L. J. Ch. 625; 43 L. T. 152; 28 W. R. 975	294
<i>Rossiter v. Miller</i> (1878), 48 L. J. Ch. 10; 3 App. Cas. 1124; 39 L. T. 173 (6 R. C. 174)	341
<i>Routh v. Thompson</i> (1809), 11 East, 428	360
<i>Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro</i> (1887), 57 L. J. Q. B. 31; 19 Q. B. D. 362; 36 W. R. 105	381
<i>Rutter v. Chapman</i> (1841), 8 M. & W. 1 (7 R. C. 180)	49
<i>Rylands v. Fletcher</i> (H. L. 1868), 37 L. J. Ex. 161; L. R. 3 H. L. 330; 35 L. J. Ex. 154; L. R. 1 Ex. 265; 14 L. T. 523; 19 L. T. 220; 14 W. R. 799 (1 R. C. 235)	418 <i>et seq.</i>
<i>Sadler v. Dixon</i> (1839, 1840), 9 L. J. (N. S.) Ex. 48; 5 M. & W. 405; affirmed 8 M. & W. 895 (14 R. C. 58)	368
<i>Samuel v. Royal Exchange Assur. Co.</i> (1826), 8 B. & C. 119 (13 R. C. 631)	366
<i>Sandeman v. Scurr</i> (1866), 36 L. J. Q. B. 58; L. R. 2 Q. B. 86; 15 L. T. 608; 15 W. R. 277; 8 B. & S. 50	349
<i>Sands' (Sir George) Case</i> (1663), 3 Salk. 22 (2 R. C. 98)	285
<i>Sarquy v. Hobson</i> (1823, 1827), 2 B. & C. 7; 4 Bing. 131	378
<i>Saunders v. Wiel</i> (C. A. 1892), 62 L. J. Q. B. 341; (1893), 1 Q. B. 470; 68 L. T. 183; 41 W. R. 356 (25 R. C. 257)	237
<i>Scaramanga v. Stamp</i> (C. A. 1880), 49 L. J. C. P. 674; 5 C. P. D. 295; 42 L. T. 840; 28 W. R. 691	375
<i>Scott v. Hanbury; Scott, In re</i> (1891), 60 L. J. Ch. 461; (1891), 1 Ch. 298; 63 L. T. 800; 39 W. R. 264	286
<i>Scott v. Morley</i> (C. A. 1887), 57 L. J. Q. B. 43; 20 Q. B. D. 120; 57 L. T. 919; 36 W. R. 67	270
<i>Scott v. Rayment</i> (1868), 38 L. J. Ch. 48; L. R. 7 Eq. 112	404
<i>Scott v. Shepherd, Smith's Lead, Cas.</i> ; 2 W. Bl. 892; 3 Wils. 403	419
<i>Seaman v. Netherclift</i> (C. A. 1876), 46 L. J. C. P. 128; 2 C. P. D. 53; 35 L. T. 784; 25 W. R. 159	432

	PAGE
Searles v. Scarlett (1892), 61 L. J. Q. B. 573; (1892), 2 Q. B. 56; 66 L. T. 837; 40 W. R. 696	433
Sewell v. Burdick (H. L. 1884), 54 L. J. Q. B. 156; 10 App. Cas. 74; 52 L. T. 445; 33 W. R. 461 (4 R. C. 758)	261
Shadwell v. Shadwell (1860), 30 L. J. C. P. 145; 9 C. B. (N. S.) 159; 7 Jur. (N. S.) 311; 3 L. T. 628; 9 W. R. 163 (6 R. C. 9)	406
Shaw v. Great Western Ry. Co. (1894), 1 Q. B. 373; 70 L. T. 218; 42 W. R. 285	354
Shawe v. Felton (1801), 2 East, 109 (13 R. C. 631)	366
Sheddan v. Sheddan (1756), Morr. Dict. of Decisions, voce "Slave," vol. 33, p. 14	122 n.
Sheffield Corporation v. Barclay (1905), 74 L. J. K. B. 747; (1905), A. C. 392; 93 L. T. 83; 54 W. R. 49	415
Shepherd v. Whitaker (1875), L. R. 10 C. P. 502; 32 L. T. 402	431
Shirreff v. Wilks (1800), 1 East, 48	400
Simmonds v. Hodgson (1832), 3 B. & Ad. 50	362
Simonds v. White (1824), 2 B. & C. 805 (14 R. C. 422)	382
Simpson v. Lamb (1857), 20 L. J. Q. B. 121; 7 El. & Bl. 34; 3 Jur. (N. S.) 412	334
Skyring v. Greenwood (1825), 4 B. & C. 281 (21 R. C. 60)	411
Smart v. Tranter (1890), 59 L. J. Ch. 363; 43 Ch. D. 587; 62 L. T. 353; 38 W. R. 530	286
Smith v. Adams (1854), 24 L. J. Ch. 258; 5 De G. M. & G. 712; 18 Jur. 968 (43 E. R.)	79
Smith v. Everett (1859), 29 L. J. Ch. 236; 27 Beav. 416; 5 Jur. (N. S.) 1332; 7 W. R. 605 (54 E. R.); 19 R. C. 649	405
Smith v. London & St. Katherine's Dock Co. (1868), 37 L. J. C. P. 217; L. R. 3 C. P. 326	422
Smith v. L. & S. W. Ry. Co. (Ex. Ch. 1870), 40 L. J. C. P. 21; L. R. 6 C. P. 14; 23 L. T. 678; 19 W. R. 230 (18 R. C. 726)	50
Somerset, James (Case of) (1772), 20 St. Tr. 1; Loft. 1; 1 Ld. Raym. 147	29, 90, 122 n.
Sottomayor v. De Barros (1877-1879), 47 L. J. P. 23; 49 L. J. P. 1; 3 P. D. 1; 5 P. D. 94; 37 L. T. 415; 41 L. T. 281; 26 W. R. 455; 27 W. R. 917 (5 R. C. 814)	82
Southcote v. Stanley (1856), 25 L. J. Ex. 339; 1 H. & N. 241 (19 R. C. 60)	423
South Wales Miners' Federation v. Glamorgan Coal Co. (1905), 74 L. J. K. B. 525; (1905), A. C. 239; 92 L. T. 710; 53 W. R. 593	95, 515
Speight v. Gaunt (H. L. 1883), 53 L. J. Ch. 419; 9 App. Cas. 1; 50 L. T. 330; 32 W. R. 435 (25 R. C. 298)	412
Spitta v. Woodman (1810), 2 Taunt. 416 (13 R. C. 569)	366
Stafford v. Stafford; Price, <i>In re</i> (1885), 54 L. J. Ch. 509; 28 Ch. D. 709; 52 L. T. 430; 33 W. R. 20	77
Stanley v. Stanley (1740), 1 Atk. 455 (26 E. R.)	293
Stanton v. Lambert; Lambert's Estate, <i>In re</i> (1888), 57 L. J. Ch. 927; 39 Ch. D. 626; 59 L. T. 429	78, 286
Stanton v. Richardson (1872, 1874), 41 L. J. C. P. 180; 43 L. J. C. P. 230; L. R. 7 C. P. 421; L. R. 9 C. P. 390; 33 L. T. 193; 24 W. R. 324 (5 R. C. 631)	350
Stapilton v. Stapilton (1739), 1 Atk. 2 (26 E. R.)	407
Stapley v. London, Brighton & South Coast Ry. Co. (1865), 35 L. J. Ex. 7; L. R. 1 Ex. 21; 11 Jur. (N. S.) 951; 13 L. T. 406; 14 W. R. 132; 4 H. & C. 93	423
Steel v. State Line Steamship Co. (1877), 3 App. Cas. 72; 37 L. T. 333 (4 R. C. 697)	351
Sterry v. Clifton (1850), 19 L. J. C. P. 237; 9 C. B. 110; 14 Jur. 312	332
Stevens v. Biller (C. A. 1883), 53 L. J. Ch. 249; 35 Ch. D. 31; 50 L. T. 36; 32 W. R. 419	389
Stevenson v. McLean (1880), 49 L. J. Q. B. 701; 5 Q. B. D. 316; 42 L. T. 897; 28 W. R. 916 (6 R. C. 80)	341

	PAGE
Stewart v. Aberdein (1838), 7 L. J. (N. S.) Ex. 292; 4 M. & W. 211	393
Stewart v. Casey; <i>In re</i> Casey (1892), 61 L. J. Ch. 61; (1892), 1 Ch. 104; 66 L. T. 93; 40 W. R. 180	407, 410
Stockdale v. Hansard (1839), 9 A. & E. 1	432
Stoddart v. Hawke (1902), 71 L. J. K. B. 133; (1902), 1 K. B. 353; 85 L. T. 687; 50 W. R. 93	556
Stogdon v. Lee (C. A. 1891), 60 L. J. Q. B. 669; (1891), 1 Q. B. 661; 64 L. T. 494; 39 W. R. 467	76
Storey v. Ashton (1869), 38 L. J. Q. B. 223; L. R. 4 Q. B. 476; 17 W. R. 727; 10 B. & S. 337	424
Stribley v. Imperial Marine Insur. Co. (1876), 45 L. J. Q. B. 396; 1 Q. B. D. 507; 34 L. T. 281; 24 W. R. 701 (13 R. C. 491)	365
Strong v. Natally (1804), 1 Bos. & P. (N. R.) 16 (13 R. C. 627)	366
Stubbs' Estate, <i>Re</i> ; Hanson v. Stubbs (1878), 47 L. J. Ch. 671; 8 Ch. D. 154; 26 W. R. 736 (2 R. C. 203)	290
Studd v. Watson (1884), 54 L. J. Ch. 626; 28 Ch. D. 305; 52 L. T. 129; 33 W. R. 118	314
Sturgis v. Corp (1806), 13 Ves. 190 (33 E. R.)	73
Sturt v. Blagg (1847), 16 L. J. Q. B. 39; 10 Q. B. 899; 11 Jur. 1011 (9 R. C. 117)	527
Surman v. Wharton (1891), 60 L. J. Q. B. 233; (1891), 1 Q. B. 491; 64 L. T. 866; 39 W. R. 416	286
Swaissland v. Dearsley (1861), 29 Beav. 430 (54 E. R.)	342
Swans (Case of), Co. Rep. 17	220 n.
Sweeting v. Pearce (1860, 1861), 29 L. J. C. P. 265; 30 L. J. C. P. 109; 7 C. B. (N. S.) 449; 9 C. B. (N. S.) 534; 5 L. T. 79; 9 W. R. 343	393
Taafe v. Downes (1813), 3 Moo. P. C. 36 n.; 3 St. Tr. (N. S.) 1317 (13 E. R.)	571
Taff Vale, &c., Co. v. Amalgamated Society of Railway Servants (1901), 70 L. J. K. B. 905; (1901), A. C. 426; 85 L. T. 147; 50 W. R. 44	52
Tailby v. Official Receiver (H. L. 1888), 58 L. J. Q. B. 75; 13 App. Cas. 523; 60 L. T. 162; 37 W. R. 513 (10 R. C. 445)	268
Taltarum's Case (1472), Year Book, 12 Ed. IV. Mich. T. 123, 131 <i>et seq.</i>	
Tarry v. Ashton (1876), 45 L. J. Q. B. 260; 1 Q. B. D. 314; 34 L. T. 97; 24 W. R. 581 (19 R. C. 4)	424
Tattersall v. National Steamship Co. (1881), 53 L. J. Q. B. 332; 12 Q. B. D. 297; 50 L. T. 293; 32 W. R. 566 (4 R. C. 697)	351
Taylor v. Bowers (C. A. 1876), 46 L. J. Q. B. 39; 1 Q. B. D. 291; 31 L. T. 938; 24 W. R. 499	334
Taylor v. Dunbar (1869), 38 L. J. C. P. 178; L. R. 4 C. P. 206; 17 W. R. 382	377
Taylor v. Smetten (1883), 52 L. J. M. C. 101; 11 Q. B. D. 207; 48 J. P. 36	336
Tenant v. Goldwin, 1 Salk. 21, 360; 2 Ld. Raym. 1089	417
Tewkesbury (Bailiffs of) v. Bricknell (1809), 2 Taunt. 120 (7 R. C. 260)	48
Thetis, The (1869), 38 L. J. Adm. 42; L. R. 2 A. & E. 365	425
Thomas v. Bradbury, Agnew & Co. (C. A. 1906), 75 L. J. K. B. 726; (1906), 2 K. B. 627; 95 L. T. 23; 54 W. R. 608	434
Thompson v. Hopper (1856), 26 L. J. Q. B. 18; 6 El. & Bl. 937; 3 Jur. (N. S.) 133	377
Thoroughgood's, Case of (1582), 2 Co. Rep. 9a (6 R. C. 202)	328, 342
Timothy v. Simpson (1835), 4 L. J. (N. S.) Ex. 81; 1 Cr. M. & R. 757	607
Tone Conservators v. Ash (1829), 8 L. J. K. B. 226; 10 B. & C. 349 (7 R. C. 239)	48
Toogood v. Spyring (1834), 3 L. J. Ex. 347; 1 Cr. M. & R. 181 (9 R. C. 55)	433
Trego v. Hunt (H. L. 1895), 65 L. J. Ch. 1; (1896), A. C. 7; 73 L. T. 514; 44 W. R. 225 (12 R. C. 442)	235, 405
Trinder v. North Queensland Insur. Co. (1897), 66 L. J. Q. B. 802	377

	PAGE
Trotman v. Dunn (1815), 4 Camp. 211	432
Tyrell v. Bank of London (1864), 31 L. J. Ch. 369; 10 H. L. Cas. 26; 8 Jur. (N. S.) 849 (10 E. R.; 2 R. C. 496)	389
Underwood v. Robertson (1815), 4 Camp. 138	397
Usher v. Noble (1810), 12 East, 639 (14 R. C. 438)	383
Usparicha v. Noble (1811), 13 East, 332 (13 R. C. 563)	333
Valentine v. Canali (1889), 59 L. J. Q. B. 74; 24 Q. B. D. 166; 61 L. T. 731; 38 W. R. 331	330
Valieri v. Boyland (1866), 35 L. J. C. P. 215; L. R. 1 C. P. 382; 12 Jur. (N. S.) 566; 14 L. T. 362; 14 W. R. 637 (5 R. C. 675)	351
Van Diemen's Land Co. v. Table Cape Marine Board (1906), 75 L. J. P. C. 28; (1906), A. C. 92; 93 L. T. 709; 54 W. R. 498	107 n.
Vandyck v. Hewitt (1800), 1 East, 96 (14 R. C. 538)	384
Van Gheluive v. Nerinckx (1882), 51 L. J. Ch. 929; 21 Ch. D. 189; 47 L. T. 46; 30 W. R. 789	290
Vaughan v. Taff Vale Ry. Co. (Ex. Ch. 1860), 29 L. J. Ex. 247; 5 Hurl. & N. 679; 6 Jur. (N. S.) 899; 2 L. T. 394; 8 W. R. 594 (1 R. C. 297)	50, 423
Vyse v. Foster (H. L. 1874), 44 L. J. Ch. 37; L. R. 7 H. L. 318; 31 L. T. 177; 23 W. R. 355 (19 R. C. 693)	405
Waghorne v. Langmead (1796), 1 Bos. & P. 571 (11 R. C. 623)	262 n.
Wain v. Warlters (1804), 5 East, 10 (6 R. C. 231)	344
Walker v. Mottram (C. A. 1881), 51 L. J. Ch. 108; 19 Ch. D. 355; 45 L. T. 659; 30 W. R. 165	234
Walter v. Lane (1900), 69 L. J. Ch. 699; (1900), A. C. 539; 83 L. T. 289; 49 W. R. 95	232
Wanless v. North Eastern Ry. Co. (Ex. Ch. 1871), 43 L. J. Q. B. 185; L. R. 7 H. L. 12; 30 L. T. 275; 22 W. R. 561; affirming L. R. 6 Q. B. 481; 25 L. T. 103	424
Wason v. Walter (1868), 38 L. J. Q. B. 34; L. R. 4 Q. B. 73; 19 L. T. 409; 17 W. R. 169; 8 B. & S. 671	432
Watson v. Clark (H. L. 1813), 1 Dow. 336 (3 E. R.; 14 R. C. 50)	368
Watt v. Watt (1796), 3 Ves. 244 (30 E. R.)	285
Webb v. Stenton (C. A. 1883), 52 L. J. Q. B. 584; 11 Q. B. D. 518; 49 L. T. 432 (11 R. C. 685)	244
Wells v. Hopwood (1832), 3 B. & Ad. 20 (14 R. C. 187)	371
Wellesley v. Wellesley (H. L. 1827), 2 Bligh N. S. 124; 1 Dow. & Cl. 152 (4 E. R.; 6 E. R.)	85, 88
Western v. Bailey (C. A. 1896), 66 L. J. Q. B. 48; (1897), 1 Q. B. 86; 75 L. T. 470; 45 W. R. 115 (17 R. C. 1)	240
Whatman v. Pearson (1868), 37 L. J. C. P. 156; L. R. 3 C. P. 422; 18 L. T. 290; 16 W. R. 649	424
White v. White (1906), 75 L. J. P. C. 14; (1906), A. C. 72; 94 L. T. 65	103
Whitehead v. Tuckett (1812), 15 East, 400 (2 R. C. 357)	387
Whitley Partners, Ltd., <i>In re</i> (C. A. 1886), 55 L. J. Ch. 540; 32 Ch. D. 337; 54 L. T. 912; 34 W. R. 505 (2 R. C. 273)	385
Wight v. Brown (1849), Court of Session Cases, 2nd Series, vol. ii. pp. 459, 470	363
Willesford v. Watson (1873), 42 L. J. Ch. 447; L. R. 8 Ch. 473; 28 L. T. 428; 21 W. R. 350 (3 R. C. 373)	470
Williams' Estate, <i>Re</i> ; Williams v. Williams (1872), 42 L. J. Ch. 158; L. R. 15 Eq. 270; 28 L. T. 17; 21 W. R. 160	290
Williams, <i>In re</i> ; Jones v. Williams (1887), 57 L. J. Ch. 264; 36 Ch. D. 573; 57 L. T. 756; 36 W. R. 34	290
Williams v. Arkle (H. L. 1875), 45 L. J. Ch. 590; L. R. 7 H. L. 606; 33 L. T. 187; 24 W. R. 215	293

	PAGE
Williams v. Bayley (1866), 35 L. J. Ch. 717; L. R. 1 H. L. 200; 12 Jur. (N. S.) 875; 14 L. T. 802 (6 R. C. 455)	334
Williams v. Shee (1813), 3 Camp. 469	374
Williams v. Williams; Williams' Estate, <i>Re</i> (1872), 42 L. J. Ch. 158; L. R. 15 Eq. 270; 28 L. T. 17; 21 W. R. 160	290
Wilson v. Bank of Victoria (1867), 36 L. J. Q. B. 89; L. R. 2 Q. B. 203; 16 L. T. 9; 15 W. R. 693	381
Wilson v. Jones (Ex. Ch. 1867), 36 L. J. Ex. 78; L. R. 2 Ex. 139; 16 L. T. 669; 15 W. R. 435 (13 R. C. 299)	362
Wilson v. Merry (1868), L. R. 1 H. L. Sc. 326; 2 Paterson, 1597 (19 R. C. 132)	93
Wilson v. Millar (1820), 2 Stark, 1	252, 397
Wilson v. Owners of Cargo ex Xantho (H. L. 1887), 56 L. J. P. 116; 12 App. Cas. 503; 57 L. T. 701; 36 W. R. 353 (24 R. C. 372)	352, 376
Windhill Local Board of Health v. Vint (1890), 59 L. J. Ch. 608; 45 Ch. D. 351; 63 L. T. 366; 38 W. R. 738	334
Winn v. Bull (1877), 47 L. J. Ch. 139; 7 Ch. D. 29; 26 W. R. 230 (6 R. C. 171)	341
Winsor v. R. (1866), 35 L. J. M. C. 121; L. R. 1 Q. B. 289	617
Wolff v. Horncastle (1798), 1 Bos. & P. 316 (13 R. C. 265)	362
Yelverton's Case; Longworth v. Yelverton, Court of Session, 3rd Series, vol. i. p. 461	62
York & North Midland Ry. Co. v. Reg. (Ex. Ch. 1853), 22 L. J. Q. B. 225; 1 El. & Bl. 858; 17 Jur. 690; 7 Rail. Cas. 459	51
Young v. Leamington, Corporation of (1883), 52 L. J. Q. B. 713; 8 App. Cas. 517; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660	335

TABLE OF STATUTES.

	PAGE
20 Hen. 3. c. 4 (Statute of Merton, 1235)	82 n.
12 Edw. 1. (Statute of Wales)	7
13 Edw. 1. stat. 1, c. 46 (Statute of Westminster the Second)	102, 158
<i>(De donis Conditionalibus)</i>	128
c. 19 (Administration of Estates: Debt)	277
c. 24 (Statute of Westminster the Second)	426, 439
c. 26 (Stat. West. Prim.)	514
18 Edw. 1. c. 1 (<i>Quia Emptores</i>)	8, 108, 117, 123, 165
25 Edw. 1. (Magna Charta)	275
33 Edw. 1. stat. 2	521
2 Edw. 3. c. 3 (Statute of Northampton)	525
4 Edw. 3. c. 5	40
18 Edw. 3. stat. 1	125
20 Edw. 3. c. 4 (Statute of Merton)	102
25 Edw. 3. c. 2 (Treason Act, 1351)	36, 507
31 Edw. 3. c. 11 (Administration of Estates)	278, 285
5 Rich. 2. stat. c. 7 (Criminal Law: Forcible Entry)	526
15 Rich. 2. c. 2 (Benefice: Criminal Law: Forcible Entry)	526
16 Rich. 2. c. 5 (Premunire: Rome, See of)	511
8 Hen. 6. c. 9 (Benefice: Criminal Law: Forcible Entry)	526
20 Hen. 6. c. 9 (Peers and Peeresses Act)	38
4 Hen. 7. c. 24 (Fines, 1490)	130
10 Hen. 7. c. 22 (Poyning's Act)	13
21 Hen. 8. c. 5 (Administration of Estates)	78, 278, 284
c. 11 (Restitution of goods stolen)	258
22 Hen. 8. c. 5 (Statute of Bridges)	559
s. 9	112
27 Hen. 8. c. 10 (Statute of Uses)	123, 140, 164, 216
s. 4	108
s. 5	108
c. 26 (Wales)	7
31 Hen. 8. c. 1 (Partition)	170
32 Hen. 8. c. 1 (Statute of Wills)	212
c. 36 (Fines)	130
33 Hen. 8. sess. 2, c. 3 (Irish Act, 1542)	11
c. 9 (Gaming Act, 1542), s. 12	552
c. 32 (Partition)	171
34 & 35 Hen. 8. c. 5 (Wills)	212
c. 20 (Crown Lands)	136
c. 26 (Wales)	7
1 Edw. 6. c. 1 (Criminal Law: Sacrament, 1547)	516
5 & 6 Edw. 6. c. 16 (Sale of Offices Act, 1551)	332, 514
2 & 3 Ph. & M. c. 7 (Horse: Markets and Fairs)	258
1 Eliz. c. 2 (Uniformity), s. 4	516
11 Eliz. sess. 1, c. 5 (Irish Act)	11

	PAGE
13 Eliz. c. 5 (Criminal Law: Fraudulent Conveyance, 1571)	198, 245, 306
" " " " " " " s. 2	529
" " " " " " " s. 3	529
" c. 12 (Benefice: Clergy, 1571), s. 2.	516
" c. 29 (Oxford: University)	445, 602
14 Eliz. c. 8 (Recoveries)	136, 137
18 Eliz. c. 5 (Criminal Law: Penal Statute), s. 4	522
27 Eliz. c. 4 (Criminal Law: Fraudulent Conveyance, 1584)	199
29 Eliz. c. 5	198
31 Eliz. c. 6 (Benefice: Clergy: Colleges: Corrupt Practices)	193
" c. 11 (Criminal Law: Forceful Entry)	526
" c. 12 (Horse: Markets and Fairs)	258
43 Eliz. c. 2 (Poor Relief Act, 1601), s. 7	83
21 Jas. 1. c. 8 (Certiorari: Criminal Law: Forceful Entry)	526
" c. 15 (Intrusion, Information of: <i>Scire Facias</i>)	526
" c. 19 (Bankrupts), s. 11	306
12 Chas. 2. c. 24 (Abolition of Old Tenures Act, 1660)	87, 117, 118
" " " " " " s. 7	209
" " " " " " s. 8	87
13 Chas. 2. stat. 1, c. 1 (Criminal Law: Crown: Evidence: Peers: Witness), s. 3	511
14 Chas. 2. c. 4 (Act of Uniformity, 1662), s. 20	517
22 & 23 Chas. 2. c. 10 (Statute of Distribution)	79, 289, 292, 294, 502
" " " " " " s. 5	174
29 Chas. 2. c. 3 (Statute of Frauds)	199, 202, 281, 343, 390
" " " " " " s. 1	145
" " " " " " s. 3	158
" " " " " " s. 4	264, 343
" " " " " " s. 12	213
" " " " " " s. 17	250
" " " " " " s. 19	325
" " " " " " s. 25	292, 294
31 Chas. 2. c. 2 (Habeas Corpus Act, 1679)	29, 427
1 Will. & Mary, sess. 2, c. 2 (Bill of Rights)	29, 33
" c. 18 (Toleration Act), s. 15	517
2 Will. & Mary, c. 5, s. 3	520
" " " " " " s. 4	520
4 & 5 Will. & Mary, c. 2 (Wills)	275
7 & 8 Will. 3. c. 3 (Treason Act, 1695)	602
" " " " " " s. 11	602
" c. 2, s. 2	616
" c. 38 (Wills)	84 n., 275
9 & 10 Will. 3. c. 35 (Blasphemy, 1697)	517
10 & 11 Will. 3. c. 17 (Lottery Act, 1698)	556
12 & 13 Will. 3. c. 2 (Act of Settlement, 1700)	33
2 & 3 Anne, c. 5 (Wills)	84 n., 275
6 Anne, c. 11 (Union with Scotland Act, 1706)	8
" c. 18 (Yorkshire, W. Riding: Land Registry)	166
" c. 41 (Succession to the Crown Act, 1707)	511
" c. 71 (East India Company, 1707)	19
7 Anne, c. 5 (Foreign Protestants Naturalization Act, 1708)	41, 188
" c. 12 (Diplomatic Privileges Act, 1708)	35
" c. 20 (Middlesex Registry Act, 1708)	207
8 Anne, c. 14 (Landlord and Tenant Act, 1709), s. 6	318
" " " " " " s. 7	318
" c. 19 (Literary Copyright Act, 1709)	229
1 Geo. 1. stat. 2, c. 5 (Riot Act).	524
6 Geo. 1. c. 5 (Irish House of Lords, 1719)	13
11 Geo. 1. c. 18	84 n.
" " s. 17	275, 502

	PAGE
2 Geo. 2. c. 25 (Perjury Act, 1728), s. 2	520
4 Geo. 2. c. 21 (British Nationality Act, 1730)	41, 188
„ c. 28 (Landlord and Tenant Act, 1730)	147
„ „ „ „ „ s. 5	107
8 Geo. 2. c. 13 (Engraving Copyright Act, 1734)	229, 231
11 Geo. 2. c. 19 (Distress for Rent Act, 1737)	226
„ „ „ „ „ s. 15	147
„ „ „ „ „ s. 18	318
13 Geo. 2. c. 17 (Exemption from Impressment Act, 1739)	45
19 Geo. 2. c. 13 (Parliament (Ireland) Act 1746)	62
„ c. 37 (Marine Insurance Act, 1745)	358
20 Geo. 2. c. 42 (Wales and Berwick Act, 1746), s. 3	7
25 Geo. 2. c. 36 (Disorderly Houses Act, 1751), s. 8	551
„ c. 37 (Murder Act, 1751), s. 9	519
26 Geo. 2. c. 33 (Lord Hardwicke's Act, 1753)	57, 59, 81
„ „ „ „ „ s. 13	59
„ „ „ „ „ s. 18	59
5 Geo. 3. c. 26 (Isle of Man Purchase Act, 1765)	15
7 Geo. 3. c. 38 (Engraving Copyright Act, 1766)	229, 231
10 Geo. 3. c. 47 (East India Company Act, 1770), s. 4	596
12 Geo. 3. c. 11 (Royal Marriages Act, 1772)	37
13 Geo. 3. c. 21 (British Nationality Act, 1772)	41, 188
„ c. 63 (East India Company's Act, 1772)	20
„ „ „ „ „ s. 39	596
14 Geo. 3. c. 48 (Life Assurance Act, 1774)	363
15 Geo. 3. c. 53 (Copyright Act, 1775)	229
17 Geo. 3. c. 57 (Prints Copyright Act, 1777)	229, 231
21 & 22 Geo. 3. c. 48 (Irish Act)	14
23 Geo. 3. c. 28 (Irish Act)	14
24 Geo. 3. c. 25 (East India Company Act, 1784)	20
26 Geo. 3. c. 63 (Navy)	281
28 Geo. 3. c. 56 (Insurance)	362
32 Geo. 3. c. 34 (Navy), s. 1	281
„ c. 60 (Libel Act, 1792: Fox's Act)	527
36 Geo. 3. c. 7 (Treason Act, 1795)	507
„ c. 52 (Legacy Duty Act, 1796)	499
37 Geo. 3. c. 70 (Incitement to Mutiny Act, 1797)	512
„ „ „ „ „ s. 70	546
„ c. 123 (Unlawful Oaths Act, 1797)	512
39 & 40 Geo. 3. c. 93 (Treason Act, 1800)	616
40 Geo. 3. c. 67 (Act of Union, 1800)	14
42 Geo. 3. c. 119 (Gaming Act, 1802), s. 2	336
44 Geo. 3. c. 54 (Yeomanry Act, 1804)	47
45 Geo. 3. c. 72 (Prize Act, 1805), s. 3	360
49 Geo. 3. c. 126 (Sale of Offices Act, 1809)	332, 514
51 Geo. 3. c. 37 (Marriage Act, 1811)	61
„ c. 104 (Unlawful Oaths Act, 1812)	512
52 Geo. 3. c. 155 (Places of Religious Worship Act, 1812)	517
53 Geo. 3. c. 89 (Parliamentary Writs Act, 1813), s. 6	596
„ c. 155 (East India Company's Act, 1813)	21
„ „ „ „ „ s. 39	21
„ „ „ „ „ s. 40	21
54 Geo. 3. c. 56 (Sculpture Copyright Act, 1814)	229, 232
55 Geo. 3. c. 50 (Gaol Fees Abolition Act, 1815), s. 9	514
„ „ „ „ „ s. 13	514
56 Geo. 3. c. 100 (Habeas Corpus Act, 1816)	29
57 Geo. 3. c. 6 (Treason Act, 1817)	508
58 Geo. 3. c. 81 (Administration of Estates (Ireland) Act, 1818)	61
59 Geo. 3. c. 94 (Crown Lands Act, 1819)	189, 503
60 Geo. 3. & 1 Geo. 4. c. 1 (Unlawful Drilling Act, 1819)	512

	PAGE
60 Geo. 3. & 1 Geo. 4. c. 8 (Criminal Libel Act, 1820)	517
1 & 2 Geo. 4. c. 88 (Rescue Act, 1821), s. 1	511
3 Geo. 4. c. 114 (Hard Labour Act, 1822)	519
4 Geo. 4. c. 76 (Marriage Act, 1823)	520
" " " " s. 8	59, 61
" " " " s. 13	56
" " " " s. 16	59
" " " " s. 22	55
" " " " s. 23	60
" " " " s. 27	60
" " " " s. 31	59
5 Geo. 4. c. 32 (Marriage Act, 1824)	60
" c. 83 (Vagrant Act, 1824)	61
" " " " s. 4	603
" " " " s. 6	550, 551
" c. 84 (Transportation Act, 1824), s. 12	608
" c. 95 (Combinations of Workmen)	519, 520
6 Geo. 4. c. 50 (Juries Act, 1825), s. 29	539
" c. 97 (Universities Act, 1825), s. 3	616
" c. 129 (Combinations of Workmen)	603
7 & 8 Geo. 4. c. 28 (Criminal Law Act, 1827), s. 2	539
" c. 29 (Larceny), s. 57	615
9 Geo. 4. c. 14 (Lord Tenterden's Act)	258, 585
" c. 69 (Night Poaching Act, 1828), s. 1	330
" " " " s. 2	525, 573
" " " " s. 9	572, 607
" " " " s. 12	525, 599
11 Geo. 4. & 1 Will. 4. c. 18 (Marriage Confirmation Act, 1830)	525
" " c. 20 (Navy), s. 48	61
" " " " s. 49	281
" " " " s. 50	281
" " c. 40 (Executors Act, 1830)	281
" " c. 68 (Carriers Act, 1830)	292
" " " " s. 1	353
" " " " s. 8	353
2 & 3 Will. 4. c. 40 (Admiralty), s. 14	353
" " " " s. 15	281
" c. 71 (Prescription Act, 1832)	281
" " " " s. 2	103
" " " " s. 3	192
3 & 4 Will. 4. c. 15 (Dramatic Copyright Act, 1833)	192
" " " " s. 22	229
" c. 27 (Real Property Limitation Act, 1833), s. 10	230
" " " " s. 34	180
" " " " s. 36	179, 191
" " " " s. 39	171, 180
" c. 41 (Judicial Committee Act, 1833)	179
" c. 74 (Fines and Recoveries Act, 1833)	19, 24
" " " " s. 18	71, 135, 211
" " " " ss. 50-54	136
" c. 85 (Government of India Act, 1833)	211
" " " " ss. 1 & 2	21
" " " " s. 42	22
" " " " s. 43	21
" " " " s. 53	22
" " " " s. 111	25
" c. 104 (Administration of Estates Act, 1833)	19
" c. 105 (Dower Act, 1833)	187
" c. 106 (Inheritance Act, 1833)	79, 138
	182, 186

	PAGE
3 & 4 Will. 4. c. 106 (Inheritance Act, 1833), s. 6	185
4 & 5 Will. 4. c. 28 (Marriage (Scotland) Act, 1834)	65
" c. 36 (Central Criminal Court Act, 1831)	597, 599
" " " " " s. 9	600
" " " " " s. 22	597
" c. 67 (Transportation Act, 1834)	520
5 & 6 Will. 4. c. 24 (Naval Enlistment Act, 1835)	45
" c. 50 (Highway Act, 1835)	558
" " " " s. 21	112
" " " " ss. 84-93	111
" " " " s. 94	558
" c. 54 (Marriage Act, 1835 : Lord Lyndhurst's Act)	56, 61, 67, 82
" c. 62 (Statutory Declarations Act, 1835), s. 13	521
" c. 65 (Lectures Copyright Act, 1835)	229, 232
" c. 76 (Municipal Corporations Act, 1835)	49
6 & 7 Will. 4. c. 59 (Prints and Engravings Copyright (Ireland) Act, 1836)	229, 231
" c. 66 (Lotteries Act, 1836)	556
" c. 85 (Marriage Act, 1836)	61
" " " " s. 2	60
" " " " s. 20	60
" " " " s. 21	60
" c. 110 (Copyright Act, 1836)	229
7 Will. 4. & 1 Vict. c. 22 (Births and Deaths Registration Act, 1837)	61
" " c. 26 (Wills Act, 1837)	77, 203, 213, 278
" " " " s. 3	190, 213, 275
" " " " s. 6	190
" " " " s. 7	279
" " " " s. 9	214, 281
" " " " s. 11	281
" " " " s. 18	282
" " " " s. 19	282
" " " " s. 20	283
" " " " s. 21	283
" " " " s. 24	77, 279
" " " " s. 28	125, 215
" " " " s. 32	215
" " " " s. 33	216
" " c. 36 (Post Office Offences Act, 1837), s. 36	546
" " c. 91 (Punishment of Offences Act, 1837)	519, 524
" " " " s. 1	519
1 & 2 Vict. c. 38 (Vagrancy Act, 1838), s. 2	551
" c. 110 (Judgments Act, 1838)	158, 488
2 & 3 Vict. c. 11 (Judgments Act, 1839)	158
" c. 54 (Talfourd's Act)	83
3 & 4 Vict. c. 9 (Parliamentary Papers Act, 1810)	432
" c. 72 (Marriage Act, 1840)	61
" c. 82 (Judgments Act, 1810)	158
5 & 6 Vict. c. 38 (Quarter Sessions Act, 1842)	598
" " " " s. 1	5, 7, 598
" " " " s. 2	615
" c. 45 (Copyright Act, 1842)	229
" c. 51 (Treason Act, 1842)	510
6 & 7 Vict. c. 30 (Pound-breach Act, 1843)	520
" c. 73 (Solicitors Act, 1843), s. 32	459
" c. 96 (Libel Act : Lord Campbell's, 1813)	434
" " " " s. 2	434
" " " " s. 3	527
" " " " s. 4	527
" " " " s. 5	527

	PAGE
6 & 7 Vict. c. 96 (Libel Act: Lord Campbell's, 1843), s. 6	434, 528
7 & 8 Vict. c. 2 (Admiralty Offences Act, 1844)	596
" c. 29 (Night Poaching Act, 1844)	526
" c. 71 (Middlesex Sessions Act, 1844)	600
" c. 81 (Marriage (Ireland) Act, 1844)	61
" " " " s. 1	63
" " " " s. 3	62
" " " " s. 4	63
" " " " s. 12	63
" " " " s. 13	64
" " " " s. 16	64
" " " " s. 29	64
" " " " s. 30	64
" c. 112 (Merchant Seamen Act, 1844), s. 6	321
8 & 9 Vict. c. 20 (Railway Clauses Consolidation Act, 1845)	50
" " " " s. 46	111
" " " " ss. 49-66	111
" " " " s. 103	428
" " " " s. 104	428
" c. 75 (Libel Act, 1845), s. 2	434
" c. 76 (Revenue Act, 1845), s. 4	292
" c. 106 (Real Property Act, 1845)	167, 195, 203, 205
" " " " s. 2	205
" " " " s. 3	145, 204, 209
" " " " s. 4	162, 193, 199
" " " " s. 5	197
" " " " s. 8	162
" c. 109 (Gaming Act, 1845)	335
" " " " s. 1	553
" " " " s. 2	553
" " " " s. 4	553
" " " " s. 15	552
" " " " s. 18	335
" c. 113 (Documentary Evidence Act, 1845)	479
9 & 10 Vict. c. 54 (Practitioners in Common Pleas)	460
" c. 59 (Religious Disabilities Act, 1846), s. 4	517
" c. 62 (Abolition of Deodands)	192
" c. 95 (County Courts)	443
10 & 11 Vict. c. 15 (Gasworks Clauses Act, 1847)	319
" c. 27 (Harbour Docks and Piers Clauses Act, 1847), s. 74	420
" c. 89 (Police Clauses Act, 1847), s. 28	550
" c. 95 (Colonial Copyright Act, 1847)	229, 231
" " " " s. 5	231
" " " " s. 18	231
11 & 12 Vict. c. 12 (Treason Felony Act, 1848)	507, 508
" " " " s. 1	508
" " " " s. 2	508
" " " " s. 3	508
" " " " s. 6	509
" c. 42 (Indictable Offences Act, 1818), s. 1	609
" " " " s. 8	608, 609
" " " " s. 10	571, 608
" " " " s. 11	571, 608
" " " " ss. 12-15	571, 608
" " " " s. 16	609
" " " " s. 17	609
" " " " s. 18	609
" " " " s. 20	573
" " " " s. 23	610
" " " " s. 27	615

	PAGE
11 & 12 Vict. c. 43 (Summary Jurisdiction Act, 1848)	83, 600, 619
" " " " " s. 1	619
" " " " " s. 2	620
" " " " " s. 7	620
" " " " " s. 14	620
" c. 44 (Justices Protection Act, 1848)	40
" " " " " s. 2	571
" c. 78 (Crown Cases Act, 1848), s. 1	626
12 & 13 Vict. c. 92 (Cruelty to Animals Acts, 1849)	560
13 & 14 Vict. c. 21 (Lord Brougham's Act, 1850).	100
" c. 43 (Court of Chancery of County of Lancaster Act, 1850)	444
14 & 15 Vict. c. 19 (Prevention of Offences Act, 1851)	608
" " " " " s. 11	572
" c. 25 (Landlord and Tenant Act, 1851)	144
" c. 100 (Criminal Procedure Act, 1851) s. 1	612
" " " " " s. 9	546
" " " " " s. 13	581
" " " " " s. 19	520
" " " " " s. 21	520
" " " " " s. 29	519, 550
15 & 16 Vict. c. 24 (Wills Act Amendment Act, 1852)	281
" c. 76 (Common Law Procedure Act, 1852)	465, 469
16 & 17 Vict. c. 69 (Naval Enlistment Act, 1853)	45
" c. 73 (Naval Volunteers Act, 1853)	45
" c. 84 (Passengers Act, 1853)	363
" c. 95 (Government of India Act, 1853)	22
" " " " " s. 28	26
" c. 119 (Betting Act, 1853)	336
" " " " " s. 1	554
" " " " " s. 2	555
" " " " " s. 3	555
" " " " " s. 4	555
" " " " " s. 6	556
" " " " " s. 7	556
17 & 18 Vict. c. 31 (Railway and Canal Traffic Act, 1854)	353
" " " " " s. 7	354
" c. 36 (Bill of Sale)	307
" c. 38 (Gaming Houses Act, 1854), s. 4	336, 553
" c. 60 (Cruelty to Animals Act, 1854)	560
" c. 85 (Oxford University Act, 1854)	445
" c. 90 (Usury Laws Repeal Act, 1854)	357
" c. 97 (Inclosure Act, 1854), s. 10	108
" c. 102 (Corrupt Practices Prevention Act, 1854), s. 10	599
" c. 104 (Merchant Shipping Act, 1854), s. 191	321
" c. 125 (Common Law Procedure Act, 1854), s. 11	470
" " " " " s. 79	180, 429
" " " " " s. 82	180
18 & 19 Vict. c. 15 (Judgments Act, 1855)	158
" c. 43 (Infants Marriage Settlement Act, 1855)	330
" c. 89 (Places of Worship Registration Act, 1855)	518
" c. 111 (Bills of Lading Act, 1855), s. 1	261, 351
" " " " " s. 3	351
" c. 120 (Metropolis Local Management Act, 1855), s. 96	559
" c. 126 (Criminal Justice Act, 1855)	581
19 & 20 Vict. c. 16 (Central Criminal Court Act, 1856)	597
" c. 96 (Lord Brougham's Act: Marriage (Scotland) Act, 1856)	66, 81
" c. 97 (Mercantile Law Amendment Act, 1856), s. 1	261
" c. 119 (Marriage and Registration Act, 1856)	61
" " " " " s. 21	63

	PAGE
19 & 20 Vict. c. 119 (Marriage and Registration Act, 1856), s. 61 . . .	60
20 & 21 Vict. c. 3 (Penal Servitude Act, 1857) . . .	524
“ “ “ “ s. 2 . . .	509, 598
“ “ “ “ s. 3 . . .	520
“ c. 43 (Summary Jurisdiction Act, 1857) . . .	631
“ “ “ “ s. 2 . . .	631
“ “ “ “ s. 3 . . .	631
“ “ “ “ s. 4 . . .	631
“ “ “ “ s. 5 . . .	631
“ “ “ “ s. 6 . . .	631
“ “ “ “ s. 14 . . .	632
“ c. 72 (Police (Scotland) Act, 1857), s. 11 . . .	608
“ c. 77 (Court of Probate Act, 1857) . . .	241, 274, 442
“ c. 83 (Obscene Publications Act, 1857) . . .	550
“ c. 85 (Matrimonial Causes Act, 1857) . . .	67, 83, 442, 450
“ “ “ “ s. 27 . . .	68
“ “ “ “ s. 28 . . .	68
“ “ “ “ s. 29 . . .	69
“ “ “ “ s. 31 . . .	69
“ “ “ “ s. 33 . . .	68, 86, 88
“ “ “ “ s. 35 . . .	69, 86, 88
“ “ “ “ s. 45 . . .	86, 88
21 & 22 Vict. c. 76 (Titles to Land (Scotland) Act, 1858) . . .	141 n.
“ c. 95 (Court of Probate Act, 1858), s. 10 . . .	444
“ “ “ “ s. 12 . . .	444
“ c. 106 (The Government of India Act, 1858) . . .	22
“ c. 108 (Matrimonial Causes Act, 1858) . . .	67, 427, 442
“ “ “ “ s. 11 . . .	68
22 & 23 Vict. c. 4 (Middlesex Sessions Act, 1859) . . .	600
“ c. 17 (Vexatious Indictments Act, 1859) . . .	619
“ “ “ “ s. 1 . . .	517, 605
“ “ “ “ s. 2 . . .	605
“ c. 61 (Matrimonial Causes Act, 1859) . . .	88, 442
“ “ “ “ s. 4 . . .	86, 88
23 & 24 Vict. c. 18 (Marriage Society of Friends Act, 1860) . . .	60, 61, 63
“ c. 24 (Marriage Confirmation Act, 1860) . . .	61
“ c. 32 (Ecclesiastical Courts Jurisdiction Act, 1860), s. 2 . . .	518
“ c. 34 (Petitions of Right Act, 1860) . . .	35
“ c. 38 (Law of Property Amendment Act, 1860) . . .	158, 290
“ c. 75 (Criminal Lunatic Asylums Act, 1860), s. 13 . . .	567
“ c. 127 (Common Law Procedure Act, 1860), s. 28 . . .	459
“ c. 144 (Matrimonial Causes Act, 1860) . . .	442
21 & 25 Vict. c. 10 (Admiralty Court Act, 1861) . . .	441
“ c. 67 (Indian Councils Act, 1861) . . .	23
“ “ “ “ s. 20 . . .	24
“ “ “ “ s. 21 . . .	24
“ “ “ “ s. 22 . . .	23
“ “ “ “ s. 23 . . .	21
“ c. 94 (Accessories and Abettors Act, 1861) . . .	562
“ c. 96 (Larceny Act, 1861) . . .	258, 526, 561, 576, 577
“ “ “ “ s. 4 . . .	577
“ “ “ “ ss. 7-9 . . .	577
“ “ “ “ s. 10 . . .	577
“ “ “ “ s. 11 . . .	577
“ “ “ “ ss. 12-16 . . .	578
“ “ “ “ s. 17 . . .	578
“ “ “ “ s. 18 . . .	222, 578
“ “ “ “ s. 19 . . .	222, 578
“ “ “ “ s. 20 . . .	522, 578
“ “ “ “ s. 21 . . .	222, 578

				PAGE
24 & 25 Vict. c. 96 (Larceny Act, 1861), s. 22	.	.	.	578
" " " " s. 23	.	.	.	578
" " " " s. 24	.	.	.	578
" " " " s. 25	.	.	.	578
" " " " s. 26	.	.	.	578
" " " " ss. 27-30	.	.	.	579
" " " " ss. 31-37	.	.	.	579
" " " " ss. 38, 39	.	.	.	579
" " " " s. 40	.	.	.	579
" " " " s. 41	.	.	.	579
" " " " s. 44	.	.	.	527, 579
" " " " s. 45	.	.	.	579
" " " " s. 46	.	.	.	527, 579
" " " " s. 47	.	.	.	579
" " " " s. 48	.	.	.	579
" " " " s. 49	.	.	.	579
" " " " s. 50	.	.	.	580
" " " " s. 51	.	.	.	580
" " " " s. 52	.	.	.	580
" " " " s. 54	.	.	.	580
" " " " s. 55	.	.	.	580
" " " " s. 56	.	.	.	580
" " " " s. 57	.	.	.	580
" " " " s. 58	.	.	.	580
" " " " s. 60	.	.	.	580
" " " " s. 61	.	.	.	580
" " " " s. 62	.	.	.	580
" " " " s. 63	.	.	.	581
" " " " s. 64	.	.	.	581
" " " " s. 65	.	.	.	581
" " " " s. 66	.	.	.	581
" " " " ss. 67-71	.	.	.	581, 582
" " " " s. 72	.	.	.	614
" " " " s. 73	.	.	.	581
" " " " s. 74	.	.	.	582
" " " " s. 75	.	.	.	582
" " " " s. 76	.	.	.	582
" " " " s. 77	.	.	.	582, 599
" " " " s. 78	.	.	.	582
" " " " s. 79	.	.	.	582
" " " " s. 80	.	.	.	582
" " " " s. 81	.	.	.	583
" " " " s. 82	.	.	.	583
" " " " s. 83	.	.	.	583
" " " " ss. 84, 85	.	.	.	583
" " " " s. 86	.	.	.	599
" " " " s. 87	.	.	.	599
" " " " ss. 88-90	.	.	.	583
" " " " ss. 91-99	.	.	.	584
" " " " s. 100	.	.	.	258, 584
" " " " s. 101	.	.	.	522, 585
" " " " s. 102	.	.	.	522
" " " " s. 103	.	.	.	572, 607
" " " " s. 104	.	.	.	573, 607
" c. 97 (Malicious Damage Act, 1861)	.	.	.	561, 589
" " " " s. 1	.	.	.	589
" " " " ss. 2-10	.	.	.	590
" " " " s. 11	.	.	.	524, 591
" " " " s. 12	.	.	.	524, 591
" " " " s. 13	.	.	.	591

						PAGE
24 & 25 Vict. c. 97 (Malicious Damage Act, 1861), s. 14	.	.	.	.	.	591
"	"	"	"	"	ss. 16-24	591
"	"	"	"	"	ss. 25-36	592
"	"	"	"	"	s. 37	593
"	"	"	"	"	s. 39	593
"	"	"	"	"	s. 40	593
"	"	"	"	"	s. 42	593
"	"	"	"	"	s. 43	593
"	"	"	"	"	s. 44	593
"	"	"	"	"	s. 45	593
"	"	"	"	"	s. 46	593
"	"	"	"	"	s. 47	593
"	"	"	"	"	s. 48	594
"	"	"	"	"	s. 49	594
"	"	"	"	"	s. 50	526, 594
"	"	"	"	"	s. 51	594
"	"	"	"	"	s. 52	594
"	"	"	"	"	s. 53	594
"	"	"	"	"	s. 54	594
"	"	"	"	"	s. 55	594
"	"	"	"	"	s. 56	594
"	"	"	"	"	s. 61	572, 607
c. 98 (Forgery Act, 1861)	.	.	.	.	.	510, 561, 586
"	"	"	"	"	s. 1	586
"	"	"	"	"	ss. 2-6	586
"	"	"	"	"	s. 7	586
"	"	"	"	"	ss. 8-11	586
"	"	"	"	"	ss. 12-19	586
"	"	"	"	"	ss. 20-26	586
"	"	"	"	"	ss. 27-29	586
"	"	"	"	"	ss. 30-37	586
"	"	"	"	"	s. 38	587
"	"	"	"	"	ss. 39-56	587
"	"	"	"	"	ss. 42-44	614
c. 99 (Coinage Offences Act, 1861)	.	.	.	.	.	510, 562
"	"	"	"	"	s. 17	511
"	"	"	"	"	s. 23	511
"	"	"	"	"	s. 31	572, 607
c. 100 (Offences against the Person Act, 1861)	.	.	.	.	.	562, 563
"	"	"	"	"	s. 1	563
"	"	"	"	"	s. 4	546, 565
"	"	"	"	"	s. 5	564
"	"	"	"	"	s. 6	563, 614
"	"	"	"	"	s. 7	565
"	"	"	"	"	s. 11	565
"	"	"	"	"	s. 12	565
"	"	"	"	"	s. 13	565
"	"	"	"	"	s. 14	546
"	"	"	"	"	s. 15	565
"	"	"	"	"	s. 16	526, 565
"	"	"	"	"	s. 17	565, 566
"	"	"	"	"	s. 18	566
"	"	"	"	"	s. 19	566
"	"	"	"	"	s. 20	566
"	"	"	"	"	s. 21	566
"	"	"	"	"	s. 22	566
"	"	"	"	"	s. 23	566
"	"	"	"	"	s. 24	566
"	"	"	"	"	s. 25	546, 566
"	"	"	"	"	s. 26	566

					PAGE
24 & 25 Vict. c. 100 (Offences against the Person Act, 1861), s. 27 . . .					566
" " " " " s. 28 . . .					566
" " " " " s. 29 . . .					566
" " " " " s. 30 . . .					566
" " " " " s. 32 . . .					566
" " " " " s. 33 . . .					566
" " " " " s. 34 . . .					566
" " " " " s. 35 . . .					565, 566
" " " " " s. 36 . . .					568
" " " " " s. 37 . . .					568
" " " " " s. 38 . . .					568
" " " " " s. 39 . . .					568
" " " " " s. 40 . . .					569
" " " " " s. 42 . . .					569
" " " " " s. 43 . . .					569
" " " " " s. 44 . . .					569
" " " " " s. 45 . . .					569
" " " " " s. 46 . . .					569
" " " " " s. 47 . . .					569
" " " " " s. 48 . . .					575
" " " " " s. 52 . . .					575
" " " " " s. 53 . . .					574
" " " " " s. 54 . . .					574
" " " " " s. 55 . . .					574
" " " " " s. 56 . . .					575
" " " " " s. 57 . . .					547
" " " " " s. 58 . . .					567
" " " " " s. 59 . . .					567
" " " " " s. 60 . . .					567
" " " " " s. 61 . . .					547
" " " " " s. 62 . . .					546, 547
" " " " " s. 64 . . .					567
" " " " " s. 65 . . .					567
" " " " " s. 66 . . .					573
" " " " " s. 67 . . .					568
" " c. 104 (Indian High Courts Act, 1861) . . .					24
" " c. 114 (Wills Act, 1861) . . .					281
25 & 26 Vict. c. 7 (India Stock Transfer Act, 1862) . . .					587
" " c. 50 (Railway Rolling Stock Protection Act, 1862) . . .					319
" " c. 53 (Land Registry Act, 1862) . . .					207
" " c. 61 (Highway Act, 1862) . . .					559
" " " " " s. 44 . . .					111
" " c. 65 (Jurisdiction in Homicides Act, 1862) . . .					597
" " c. 67 (Declaration of Tithe Act, 1862), s. 45 . . .					587
" " c. 68 (Fine Arts Copyright Act, 1862) . . .					229, 232, 233
" " " " " s. 1 . . .					233
" " " " " s. 4 . . .					232, 233
" " c. 81 (Divorce Court) . . .					442
" " c. 89 (Companies Act, 1862) . . .					51, 52, 54
" " " " " s. 79 . . .					54
" " " " " s. 199 . . .					51, 54
26 & 27 Vict. c. 27 (Marriage, etc., Ireland Act), s. 7 . . .					64
" " c. 65 (Volunteer Act, 1863) . . .					47
" " c. 73 (India Stock Certificate Act, 1863) . . .					587
" " c. 92 (Railway Clauses Act, 1863), s. 31 . . .					354
" " c. 100 (Dogs (Scotland) Act, 1863) . . .					417
27 & 28 Vict. c. 25 (Naval Prize Act, 1864) . . .					441
" " " " " s. 39 . . .					225
" " " " " s. 55 . . .					360
" " c. 101 (Highway Act, 1864) . . .					559

	PAGE
27 & 28 Vict. c. 112 (Judgments Act, 1864)	158
28 & 29 Vict. c. 17 (Government of India Act, 1865)	23
" " ss. 1, 2	23
" c. 46 (Militia Ballot Suspension Act, 1865)	47
" c. 60 (Dogs Act, 1865)	417
" c. 63 (Colonial Laws Validity Act, 1865)	18
" c. 126 (Prison Act, 1865), s. 3	519
" s. 37	519
29 & 30 Vict. c. 25 (Exchequer Bills and Bonds Act, 1866), s. 15	587
" c. 109 (Naval Discipline Act, 1866)	45
" s. 82	519
" c. 122 (Metropolitan Commons Act, 1866)	103
" c. 118 (Industrial Schools Act, 1866), s. 15	622
30 & 31 Vict. c. 35 (Criminal Law Amendment Act, 1867), s. 1	517
" c. 127 (Railway Companies Act, 1867)	51
" s. 4	51
" s. 23	51
" c. 131 (Companies Act, 1867), s. 34	587
" s. 36	587
31 & 32 Vict. c. 37 (Documentary Evidence Act, 1868), s. 4	587
" c. 40 (Partition Act, 1868)	152, 171, 411
" c. 54 (Judgments Extension Acts, 1868)	491
" c. 71 (County Courts Admiralty Jurisdiction Act, 1868)	444
" c. 77 (Divorce and Matrimonial Causes Court)	442
" c. 116 (Larceny Act, 1868)	576, 577
" s. 2	581
" c. 122 (Poor Law Amendment Act, 1868), s. 36	83
32 & 33 Vict. c. 46 (Administration of Estates Act: Hinde Palmer's Act, 1869)	187, 290, 339
" c. 49 (Local Stamp Act, 1869), s. 8	587
" c. 51 (County Courts Admiralty Jurisdiction Amendment Act, 1869)	444
" c. 62 (Debtors Act, 1869)	269, 427, 483, 492, 570
" s. 6	489
" s. 11	530
" s. 12	530
" s. 13	529
" s. 14	531
" s. 18	606
" s. 20	531
" c. 71 (Bankruptcy Act, 1869), s. 7	490
" c. 83 (Bankruptcy Repeal and Insolvent Court Act, 1869)	488
" c. 97 (Government of India Act, 1869)	23
" c. 98 (Indian Councils Act, 1869)	23
" c. 102 (Metropolitan Board of Works Loan Act, 1869), s. 19	587
" s. 21	588
" c. 114 (Abandonment of Railways Act, 1869), s. 4	54
33 & 34 Vict. c. 3 (Government of India Act, 1870)	23
" c. 14 (Naturalization Act, 1870)	41
" s. 2	188
" s. 6	41
" s. 13	43
" c. 23 (Forfeiture Act, 1870)	118, 188, 193, 238, 280, 505
" s. 6	329
" s. 7	329
" s. 8	329
" s. 10	280
" s. 18	280
" s. 30	329
" s. 31	509

		PAGE
33 & 34 Vict. c. 28	(Attorneys and Solicitors Act, 1870)	456, 459
"	" " " " s. 4	457
"	" " " " s. 6	457
"	" " " " s. 7	457
"	" " " " s. 8	457
"	" " " " s. 9	457, 459
"	" " " " s. 10	457
"	" " " " s. 11	457
"	" " " " s. 15	457
"	c. 58 (Forgery Act, 1870)	588
"	c. 76 (Absconding Debtors Act, 1870)	490, 570
"	c. 90 (Foreign Enlistment Act, 1870)	510
"	c. 93 (Married Women's Property Act, 1870)	36, 74
"	" " " " s. 10	363
"	" " " " s. 22	74
"	c. 110 (Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870)	70
"	" " " " s. 7	70
"	" " " " s. 22	74
"	" " " " s. 32	63
"	" " " " s. 37	64
34 & 35 Vict. c. 31	(Trade Union Act, 1871)	52
"	" " " " s. 2	540
"	" " " " s. 8	52
"	" " " " s. 9	53
"	c. 32 (Criminal Law Amendment Act, 1871)	540
"	c. 34 (Indian Councils Act, 1871)	23
"	c. 49 (Marriage Law (Ireland) Amendment Act, 1871), s. 15	588
"	" " " " s. 25	63
"	" " " " s. 26	63
"	" " " " s. 27	63
"	c. 79 (Lodgers' Goods Protection Act, 1871)	319
"	c. 105 (Petroleum Act, 1871)	550
35 & 36 Vict. c. 10	(Marriage (Society of Friends) Act, 1872)	60, 61, 63
"	c. 19 (Kidnapping Act, 1872)	570
"	c. 44 (Court of Chancery Funds Act, 1872), s. 12	588
"	c. 50 (Railway Rolling Stock Protection Act, 1872)	319
"	c. 65 (Bastardy Laws Amendment Act, 1872)	86
"	c. 93 (Pawnbrokers Act, 1872)	254, 347
"	" " " " s. 10	347
"	" " " " s. 13	348
"	" " " " s. 22	348
"	" " " " s. 25	348
36 & 37 Vict. c. 12	(Custody of Infants Act, 1873)	83 n.
"	" " " " s. 2	86
"	c. 38 (Vagrant Act : Amendment Act, 1873), s. 3	336
"	c. 66 (Judicature Act, 1873)	437, 445
"	" " " " s. 16	596
"	" " " " s. 18	444
"	" " " " s. 25	180, 244, 268
"	" " " " s. 29	596
"	" " " " s. 47	626
"	" " " " s. 48	629
"	c. 77 (Naval Artillery Volunteers Act, 1873)	46
37 & 38 Vict. c. 15	(Betting Act, 1874)	336, 556
"	c. 36 (False Personation Act, 1874), s. 3	599
"	c. 42 (Building Societies Act, 1874)	52
"	c. 57 (Real Property Limitation Act, 1874)	191
"	" " " " s. 9	179
"	c. 62 (Infants' Relief Act, 1874)	195

	PAGE
37 & 38 Vict. c. 62 (Infants' Relief Act, 1874), s. 1	329
" " " " " s. 2	329, 330
" c. 91 (Indian Councils Act, 1874)	23
" c. 91 (Conveyancing (Scotland) Act, 1874), s. 37	187
38 & 39 Vict. c. 17 (Explosives Act, 1875)	550
" " " " " s. 86	567
" c. 24 (Falsification of Accounts Act, 1875)	583
" c. 25 (Public Stores Act, 1875), s. 5	513
" " " " " s. 13	513
" c. 55 (Public Health Act, 1875), s. 91	548
" " " " " ss. 116-119	536, 549
" " " " " s. 144	559
" " " " " s. 171	550
" c. 63 (Friendly Societies Act, 1875)	53
" c. 63 (Sale of Food and Drugs Act, 1875)	536
" " " " " s. 2	536
" " " " " s. 3	536
" " " " " s. 4	536
" " " " " s. 6	537
" " " " " s. 7	537
" " " " " s. 8	537
" " " " " s. 9	537
" " " " " s. 30	538
" " " " " s. 32	538
" c. 77 (Supreme Court of Judicature Act, 1875), s. 26	588
" c. 79 (Legal Practitioners Act, 1875)	456
" c. 86 (Conspiracy and Protection of Property Act, 1875)	91
" " " " " s. 3	540
" " " " " s. 4	541
" " " " " s. 5	91, 541
" " " " " s. 6	91, 541
" " " " " s. 7	541
" " " " " s. 9	541
" " " " " s. 16	541
" " " " " s. 17	540
" c. 87 (Land Transfer Act, 1875)	207
" " " " " s. 113	588
" c. 90 (Employers and Workmen Act, 1875)	91
" " " " " s. 3	92
" " " " " s. 4	92
" " " " " s. 5	92
" " " " " s. 6	92
" " " " " s. 10	92
" " " " " s. 12	92
39 & 40 Vict. c. 7 (Council of India Act, 1876)	23
" c. 17 (Partition Act, 1876)	411
" c. 36 (Customs Consolidation Act, 1876)	515
" " " " " s. 28	588
" " " " " s. 190	572, 607
" c. 56 (Commons Act, 1876)	103
" " " " " s. 25	110
" c. 59 (Appellate Jurisdiction Act, 1876)	451, 490
" " " " " s. 8	490
" " " " " s. 9	490
" " " " " s. 10	627
" c. 77 (Cruelty to Animals Act, 1876)	560
" c. 79 (Elementary Education Act, 1876), s. 4	85
40 & 41 Vict. c. 2 (Treasury Bills Act, 1877), s. 10	588

	PAGE
40 & 41 Vict. c. 59 (Colonial Stock Act, 1877), s. 21	588
41 & 42 Vict. c. 41 (Bills of Sale Act, 1878)	307
" " " " s. 4	307
" " " " s. 5	309
" " " " s. 6	309
" " " " s. 7	309
" " " " s. 8	309
" " " " s. 9	310
" " " " s. 10	310
" " " " ss. 11-23	311
" " " " s. 24	312
c. 43 (Marriage Notice (Scotland) Act, 1878)	65
c. 54 (Debtors Act, 1878)	269, 492
c. 77 (Highway and Locomotives Amendment Act, 1878)	559
" " " " s. 10	559
42 & 43 Vict. c. 18 (Racecourse Licensing Act, 1879)	557
c. 22 (Prosecution of Offences Acts, 1879)	595
c. 34 (Children's Dangerous Performances Act, 1879), s. 3	567
c. 47 (Petroleum Act, 1879)	550
c. 49 (Summary Jurisdiction Act, 1879)	619, 631
" " " " s. 10	621
" " " " s. 11	621, 622
" " " " s. 12	621, 623
" " " " s. 13	621, 623
" " " " s. 14	621, 624
" " " " s. 16	624
" " " " s. 17	624
" " " " s. 19	600, 624, 629
" " " " s. 20	624
" " " " s. 29	624
" " " " s. 31	630
" " " " s. 33	632
c. 50 (Bill of Sale (Ireland))	312
c. 59 (Civil Procedure Acts Repeal Act, 1879)	280
" " " " s. 3	239
43 & 44 Vict. c. 26 (Married Women's Policies of Assurance (Scotland) Act, 1880)	363
c. 33 (Post Office Money Orders Act, 1880), s. 3	588
c. 35 (Wild Birds Protection Act, 1880)	560
c. 41 (Burial Laws Amendment Act, 1880)	518
" " " " s. 7	518
" " " " s. 8	518
c. 42 (Employers' Liability Act, 1880)	93
c. 45 (Criminal Law Amendment Act, 1880), s. 2	548
c. 47 (Ground Game Act, 1880)	223
44 & 45 Vict. c. 12 (Customs and Inland Revenue Act, 1881), s. 38	292
c. 21 (Married Women's Property (Scotland) Act, 1881)	80
" " " " s. 3	81
" " " " ss. 19-21	157
c. 41 (Conveyancing and Law of Property Act, 1881)	157, 201
" " " " s. 7	202
" " " " s. 30	218
c. 44 (Solicitors' Remuneration Act, 1881)	457, 458
" " " " s. 8	458
c. 51 (Wild Birds' Protection Act, 1881)	560
c. 57 (Regulation of the Forces Act, 1881)	47
c. 58 (Army Act, 1881)	46
" " " " s. 20	519
" " " " s. 22	519
" " " " s. 45	574

		PAGE
45 & 46 Vict.	c. 43 (Bills of Sale Act (1878) Amendment Act, 1882), s. 7	313
"	" " " " " ss. 8-14	314
"	" " " " " ss. 14-18	315
"	c. 48 (Reserve Forces Act, 1882)	47
"	c. 49 (Militia Act, 1882)	46
"	c. 50 (Municipal Corporations Act, 1882)	48, 113
"	" " " " " s. 22	48
"	" " " " " s. 169	611
"	" " " " " s. 171	40
"	" " " " " s. 216	48
"	" " " " " s. 223	571
"	c. 56 (Electric Lighting Act, 1882)	319
"	c. 75 (Married Women's Property Act, 1882)	36, 74, 138, 155,
	196, 214, 241, 294, 329, 331	
"	" " " " " s. 1 74, 269, 270, 286	
"	" " " " " s. 2	75
"	" " " " " s. 3	75
"	" " " " " s. 5	75
"	" " " " " s. 6	75
"	" " " " " s. 7	75
"	" " " " " s. 11	75, 364
"	" " " " " s. 19	76
46 & 47 Vict.	c. 51 (Corrupt and Illegal Practices Prevention Act, 1883)	514
"	c. 52 (Bankruptcy Act, 1883)	269, 290, 444, 449, 451, 497
"	" " " " " s. 4	198, 245, 270
"	" " " " " s. 6	451
"	" " " " " s. 20	272
"	" " " " " s. 31	531
"	" " " " " s. 40	290
"	" " " " " s. 43	272
"	" " " " " s. 44	272
"	" " " " " s. 45	273
"	" " " " " s. 46	273
"	" " " " " s. 47	273
"	" " " " " s. 48	273
"	" " " " " s. 49	274
"	" " " " " s. 51	272
"	" " " " " s. 55	274
"	" " " " " s. 82	274
"	" " " " " s. 103	530
"	" " " " " s. 122	484
"	" " " " " s. 163	530, 606
"	" " " " " s. 165	570, 573, 609
"	c. 57 (Patents, Designs, and Trade Marks Act, 1883)	237, 533
"	" " " " " s. 47	237
"	" " " " " s. 64	236
"	" " " " " s. 90	236
"	" " " " " s. 103	534
"	c. 61 (Agricultural Holdings England Act, 1883), s. 33	146
"	" " " " " s. 44	319
"	" " " " " s. 45	319
47 & 48 Vict.	c. 9 (Bankruptcy Appeals County Courts Act, 1884)	269
"	c. 18 (Settled Land Act, 1884)	148, 151, 154
"	" " " " " s. 4	151
"	" " " " " s. 6	149, 154, 155
"	" " " " " s. 7	150, 155
"	c. 20 (Greek Marriages Act, 1884)	61
"	c. 39 (Naval Discipline Act, 1884)	45
"	c. 43 (Summary Jurisdiction Act, 1884)	601, 619
"	" " " " " s. 6	630

	PAGE
47 & 48 Vict. c. 46 (Naval Enlistment Act, 1884)	45
„ c. 51 (Prison Act, 1884), s. 2.	519
„ c. 54 (Yorkshire Registries Act, 1884)	207
„ c. 58 (Prosecution of Offences Act, 1884)	595
„ c. 70 (Municipal Elections Corrupt and Illegal Practices Act, 1884)	514
„ c. 76 (Post Office Protection Act, 1884), s. 1	550
„ „ „ „ „ s. 4	551
48 & 49 Vict. c. 20 (Barristers' Admission (Ireland) Act, 1885)	12
„ c. 47 (Bankruptcy Office Accommodation Act, 1885)	269
„ c. 69 (Criminal Law Amendment Act, 1885), s. 2	574
„ „ „ „ „ s. 3	574
„ „ „ „ „ s. 4	546, 575
„ „ „ „ „ s. 5	546, 575
„ „ „ „ „ s. 6	575
„ „ „ „ „ s. 7	574
„ „ „ „ „ s. 9	575
„ „ „ „ „ s. 11	548
„ „ „ „ „ s. 13	551
„ „ „ „ „ s. 17	606
49 & 50 Vict. c. 3 (Marriage Validity Act, 1886)	61
„ c. 12 (Bankruptcy Office Accommodation Act, 1886)	269
„ c. 14 (Marriage Act, 1886)	61
„ c. 27 (Guardianship of Infants Act, 1886)	86, 88
„ „ „ „ „ s. 2	88
„ „ „ „ „ s. 3	89
„ „ „ „ „ s. 5	89
„ „ „ „ „ s. 7	89
„ c. 31 (Oxford University Justices Act, 1886)	603
„ c. 33 (International Copyright Act, 1886)	229, 234
50 & 51 Vict. c. 19 (Quarry Fencing Act, 1887)	549
„ c. 28 (Merchandise Marks Act, 1887), s. 2	532
„ „ „ „ „ s. 3	533
„ „ „ „ „ s. 4	534
„ „ „ „ „ s. 5	534
„ „ „ „ „ s. 13	606
„ „ „ „ „ s. 19	535
„ c. 29 (Margarine Act, 1887)	538
„ c. 30 (Settled Land Acts Amendment Act, 1887)	148
„ c. 54 (British Settlements Act, 1887)	18
„ c. 55 (Sheriffs Act, 1887), s. 6	39
„ „ „ „ „ s. 13	565
„ „ „ „ „ s. 18	39
„ „ „ „ „ s. 29	514
„ c. 57 (Deed of Arrangement Act, 1887)	269
„ c. 61 (Bankruptcy Discharge and Closure Act, 1887).	269
„ c. 70 (Appellate Jurisdiction Act, 1887)	451, 490
„ c. 71 (Coroners Act, 1887)	40
„ „ „ „ „ s. 4	617
„ „ „ „ „ s. 5	617
„ „ „ „ „ s. 8	514
„ „ „ „ „ s. 36	515
51 & 52 Vict. c. 17 (Copyright Musical Compositions Act, 1888)	229
„ c. 21 (Law of Distress Amendment Act, 1888), s. 5	318
„ „ „ „ „ s. 7	318
„ c. 31 (National Defence Act, 1888)	47
„ „ „ „ „ s. 3	46
„ c. 41 (Local Government Act, 1888)	49, 600, 611
„ „ „ „ „ s. 3	112, 551
„ „ „ „ „ s. 5	40

		PAGE
51 & 52 Vict.	c. 41 (Local Government Act, 1888), s. 11 . . .	559
"	" " " " s. 34 . . .	112
"	" " " " s. 35 . . .	611, 612
"	" " " " s. 41 . . .	559
"	" " " " s. 49 . . .	15
"	" " " " s. 69 . . .	49
"	" " " " s. 75 . . .	514
"	" " " " s. 79 . . .	112, 560
"	c. 42 (Mortmain and Charitable Uses Act, 1888) . . .	193
"	c. 43 (County Courts Act, 1888), s. 67 . . .	443, 497
"	" " " " s. 133 . . .	429
"	" " " " s. 134 . . .	430
"	" " " " s. 137 . . .	429
"	c. 50 (Patents, Designs, and Trade Marks Act, 1888), s. 10 . . .	236
"	" " " " s. 23 . . .	236
"	c. 62 (Preferential Payments in Bankruptcy Act, 1888) . . .	269
"	c. 64 (Libel Law Amendment Act, 1888), s. 3 . . .	433, 528
"	" " " " s. 4 . . .	433, 528
"	c. 65 (Solicitors Act, 1888) . . .	459
52 & 53 Vict.	c. 10 (Commissioners for Oaths Act, 1889), s. 8 . . .	588
"	c. 12 (Assizes Relief Act, 1889), s. 5 . . .	600
"	c. 18 (Indecent Advertisements Act, 1889) . . .	551
"	c. 36 (Settled Land Act, 1889) . . .	148
"	" " " " s. 2 . . .	151
"	" " " " s. 14 . . .	151
"	c. 45 (Factors Act, 1889) . . .	255, 260, 300, 305, 387
"	" " " " s. 1 . . .	255, 305
"	" " " " s. 2 . . .	256
"	" " " " s. 6 . . .	256
"	" " " " s. 7 . . .	257
"	" " " " s. 8 . . .	257
"	" " " " s. 10 . . .	257
"	c. 46 (Merchant Shipping Act, 1889), s. 1 . . .	321
"	c. 47 (Palatine Court of Durham Act, 1889) . . .	444
"	c. 49 (Arbitration Act, 1889), s. 4 . . .	470
"	" " " " s. 27 . . .	470
"	c. 52 (Official Secrets Act, 1889), s. 1 . . .	513
"	" " " " s. 2 . . .	513
"	" " " " s. 3 . . .	514, 546
"	" " " " s. 6 . . .	599
"	c. 63 (Interpretation Act, 1889), s. 3 . . .	100, 143
"	" " " " s. 11 . . .	600
"	" " " " s. 18 . . .	16
"	" " " " s. 33 . . .	548, 549
"	c. 69 (Corrupt Practices Act, 1889) . . .	514
53 & 54 Vict.	c. 5 (Lunacy Act, 1890) . . .	90
"	" " " " s. 120 . . .	90
"	" " " " s. 124 . . .	90
"	" " " " s. 322 . . .	567
"	c. 23 (Chancery of Lancaster Act, 1890), s. 6 . . .	444
"	c. 27 (Colonial Courts of Admiralty Act, 1890) . . .	226
"	c. 29 (Intestate Estates Act, 1890) . . .	79
"	" " " " s. 1 . . .	79
"	" " " " s. 2 . . .	79
"	" " " " s. 3 . . .	79
"	" " " " s. 4 . . .	79
"	" " " " s. 5 . . .	79
"	" " " " s. 6 . . .	79
"	c. 39 (Partnership Act, 1890), s. 2 . . .	399, 402
"	" " " " s. 5 . . .	399

	PAGE
53 & 54 Vict. c. 39 (Partnership Act, 1890), s. 8	399
" " " " s. 11	401
" " " " ss. 20-22	402
" " " " s. 25	403
" " " " s. 29	403
" " " " s. 30	404
" " " " s. 41	403
" " " " s. 44	405
" c. 40 (Factors (Scotland) Act, 1890)	305
" c. 53 (Bills of Sale Act, 1890)	316
" c. 59 (Public Health Amendment Act, 1890), s. 51	551
" c. 69 (Settled Land Act, 1890)	148, 151
" " " " s. 10	151
" " " " s. 14	152
" " " " s. 16	153
" c. 71 (Bankruptcy Act, 1890)	269
" " " " s. 26	530
54 & 55 Vict. c. 10 (Middlesex Registry Act, 1891)	207
" c. 15 (Merchandise Marks Act, 1891), s. 1	535
" " " " s. 2	535
" c. 38 (Stamp Duties Management Act, 1891)	515
" " " " s. 13	589
" " " " s. 18	589
" c. 39 (Stamp Act, 1891)	364
" " " " s. 91	364
" " " " s. 95	364
" c. 64 (Land Registry Middlesex Deeds Act, 1891)	207
" c. 69 (Penal Servitude Act, 1891), s. 1	520
" c. 76 (Public Health (London) Act, 1891), s. 47	536, 538
55 & 56 Vict. c. 4 (Betting and Loans (Infants) Act, 1892)	557
" " " " " s. 1	557
" " " " " s. 2	557
" " " " " s. 4	557
" " " " " s. 5	331
" c. 9 (Gaming Act, 1892)	335
" c. 14 (Indian Councils Act, 1892)	23
" c. 23 (Foreign Marriage Act, 1892)	61
56 & 57 Vict. c. 12 (Custody of Infants Act, 1893)	83
" c. 21 (Voluntary Conveyances Act, 1893)	199
" c. 39 (Industrial and Provident Societies Act, 1893)	52
" " " " " s. 21	52
" c. 53 (Trustee Act, 1893), s. 24	413
" c. 57 (Law of Commons Amendment Act, 1893)	103, 118
" c. 63 (Married Women's Property Act, 1893)	76, 196, 214, 241, 279, 329, 331
" " " " " s. 1	76
" " " " " s. 2	76
" " " " " s. 3	77, 279
" c. 71 (Sale of Goods Act, 1893)	248, 257, 261, 301, 345
" " " " " s. 4	250
" " " " " s. 14	346
" " " " " s. 16	248
" " " " " s. 17	248
" " " " " s. 18	248
" " " " " s. 20	345
" " " " " s. 22	257
" " " " " s. 24	258, 259, 585
" " " " " s. 26	261
" " " " " s. 27	345
" " " " " s. 28	345

	PAGE
56 & 57 Vict. c. 71 (Sale of Goods Act, 1893), s. 29	346
" " " " s. 30	346
" " " " s. 34	346
" " " " s. 35	346
" " " " s. 36	346
" " " " s. 41	301
" " " " s. 42	302
" " " " s. 43	302
" " " " s. 44	302
" " " " s. 45	302
" " " " s. 46	303
" " " " s. 47	251, 304
" " " " s. 48	301, 304
" " " " s. 60	250
" " " " s. 62	219, 305
" c. 73 (Local Government Act, 1894)	44, 110, 514
" " " " s. 3	49
" " " " s. 6	49, 559
" " " " s. 13	111
" " " " s. 19	111, 559
" " " " s. 24	49
" " " " s. 25	559
" " " " s. 48	514
" " " " s. 74	15
" " " " s. 75	559
57 & 58 Vict. c. 15 (Music and Dancing Licenses (Middlesex) Act, 1894)	551
" c. 19 (Merchandise Marks Prosecution Act, 1894)	535
" c. 24 (Wild Birds Protection Act, 1894)	561
" c. 30 (Finance Act, 1894)	499
" " " " s. 2	292
" c. 46 (Copyhold Act, 1894)	119
" " " " s. 88	218
" c. 60 (Merchant Shipping Act, 1894)	93, 321, 589
" " " " s. 164	321
" " " " s. 165	321
" " " " s. 167	322
" " " " ss. 195-197	46
" " " " ss. 331-335	363
" " " " s. 457	94, 550
" " " " s. 458	94
" " " " s. 544	377, 409
" " " " s. 633	425
58 & 59 Vict. c. 39 (Summary Jurisdiction (Married Women) Act, 1895)	68
" " " " s. 5 (b)	86, 88
59 & 60 Vict. c. 45 (Stannaries Court Abolition Act, 1896)	444
" c. 52 (Larceny Act, 1896)	576
" c. 56 (Wild Birds Protection Act, 1896)	561
" c. 57 (Burglary Act, 1896)	599
60 & 61 Vict. c. 37 (Workmen's Compensation Act, 1897)	93
" c. 52 (Children's Dangerous Performances Act, 1897), s. 1	567
" c. 65 (Land Transfer Act, 1897)	181, 207, 217, 498
" " " " s. 1	217, 498
" " " " s. 2	217, 284, 498
" " " " s. 12	208
61 & 62 Vict. c. 36 (Criminal Evidence Act, 1898)	609
" c. 41 (Prison Act, 1898), s. 1	519
" " " " s. 10	565, 573
62 & 63 Vict. c. 22 (Summary Jurisdiction Act, 1899)	601, 619
" " " " s. 1	621, 625
" " " " s. 2	622

	PAGE
62 & 63 Vict. c. 22 (Summary Jurisdiction Act, 1899), s. 3 . . .	625
" " " " " s. 10 . . .	621
" c. 51 (Sale of Food and Drugs Act, 1899) . . .	536, 538
" " " " " s. 17 . . .	538
" " " " " s. 26 . . .	536
63 & 64 Vict. c. 22 (Workmen's Compensation Act, 1900) . . .	93
" c. 48 (Companies Act, 1900), s. 14 . . .	268
" c. 51 (Money Lenders Act, 1900), s. 5 . . .	557
1 Edw. 7. c. 10 (Larceny Act, 1901) . . .	576, 582, 599
2 Edw. 7. c. 6 (Wild Birds Protection Act, 1902) . . .	561
" c. 8 (Cremation Act, 1902), s. 8 . . .	558
3 Edw. 7. c. 15 (Local Government (Transfer of Powers) Act, 1903)	559
" c. 42 (County Courts Act, 1903) . . .	443
4 Edw. 7. c. 4 (Wild Birds Protection Act, 1904) . . .	561
" c. 15 (Prevention of Cruelty to Children Act, 1904)	561
" " " " " s. 1 . . .	566
" " " " " s. 25 . . .	606
5 Edw. 7. c. 13 (Aliens Act, 1905) . . .	43
" " " " " s. 2 . . .	43
" c. 27 (Fertilisers and Feeding Stuffs Act, 1906) . . .	346
6 Edw. 7. c. 11 (Reserve Forces Act, 1906), s. 3 . . .	47
" c. 17 (Bills of Exchange (Crossed Cheques) Act, 1906) . . .	267
" c. 21 (Ground Game Amendment Act, 1906) . . .	223
" c. 30 (Colonial Marriages (Deceased Wife's Sister) Act, 1906)	56, 82
" c. 32 (Dogs Act, 1906) . . .	417
" c. 34 (Prevention of Corruption Act, 1906) . . .	561
" " " " " s. 1 . . .	561
" c. 36 (Musical Copyright Act, 1906) . . .	231
" c. 40 (Marriage with Foreigners Act, 1906) . . .	61
" c. 41 (Marine Insurance Act, 1906) . . .	357
" " " " " s. 4 . . .	358
" c. 43 (Street Betting Act, 1906) . . .	556
" c. 47 (Trade Disputes Act, 1906) . . .	542
" " " " " s. 1 . . .	542
" " " " " s. 2 . . .	542
" " " " " s. 3 . . .	96, 542, 545
" " " " " s. 4 . . .	53, 542, 545
" " " " " s. 5 . . .	542
" c. 53 (Public Trustee Act, 1906) . . .	54
" c. 56 (Agricultural Holdings Acts, 1888-1900), s. 10	146
" c. 58 (Workmen's Compensation Act, 1906) . . .	93

CORRIGENDA.

- Page 57, line 9 from bottom, *dele* 'so.'
- „ 107, „ 5 from bottom in note, *for* 'least' *read* 'at least.'
- „ 129, „ 7 „ *for* 'do' *read* 'de.'
- „ 175, „ 6, *for* '1808' *read* '1868.'
- „ 188, „ 19, *for* 'Geo. III.' *read* '13 Geo. III.'
- „ 231, „ 11, *for* '56' *read* '36.'
- „ 326, „ 3 from bottom, *for* 'Alexandra' *read* 'Alexander.'
- „ 349, „ 6, *for* 'magistrie' *read* 'magistri.'
- „ 349, „ 7 from bottom, *for* 'Ch' *read* 'Cl.'
- „ 352, „ 16, *for* 'word' *read* 'two.'
- „ 353, „ 10, *for* 'Compones' *read* 'Caupones.'
- „ 399, „ 15 from bottom, *for* 'show' *read* 'share.'
- „ 472, „ 16 „ *for* 'bonoe' *read* 'bona.'
- „ 531, „ 5, *dele* 'he.'
- „ 531, „ 12, „ 'he.'
- „ 531, „ 18, *for* '1863' *read* '1883.'

PRINCIPLES OF ENGLISH LAW.

INTRODUCTORY.

CHAPTER I.

DEFINITIONS.

“LAW is the command of a Sovereign, containing a common rule of life for his subjects.”

This definition—given in Erskine’s Principles of Scotch Law (1754) (*a*)—is narrow and perhaps arbitrary, but fairly represents the conception of writers on English law from Glanville to Blackstone; and, with a few explanations suggested by the late John Austin, sufficiently indicates the meaning of the word “law” as used by English lawyers at the present time.

By Sovereign, as explained by Austin, is meant the person or persons having supreme authority in an independent political society.

To the existence of law, in the above sense, it is an essential condition that the political society is so constituted that private relations are largely governed by general rules which the authorities may be relied on to enforce. In societies of a type frequently prevailing in the East—where the security of the subject largely depends on the caprice of a monarch, where oppression by petty tyrants is unrestrained by superior power, and where corruption prevails among the persons pretending to exercise judicial authority—it can hardly be said that law (in this sense)

(*a*) The definition was probably suggested to Erskine by the style of the writ in the name of the King, by which all proceedings in the Superior Courts (as well in England as in Scotland) have been commenced.

exists. On the other hand, laws very different from our own—such as Mahomedan law or Hindoo law as they are administered in British India, or perhaps in some well-administered native states, may satisfy the definition.

In effect law, as above defined, is the matured product of civilization. In ancient Greece, the citizen felt that his individual action was constrained by the law of his State; and, through the surrounding atmosphere of law (*νόμος*), the poet could discern a celestial and eternal law of Divine authority, as the standard of human conduct. The principles of law (*jus*), as controlling human action, were moulded into a system by the great jurists of the Roman Empire; and the various societies of Modern Europe, as they emerged from the dominion of uncertain custom and the caprice of feudal lords, drew largely from the fountains of the Roman *Corpus Juris*.

In European systems, where law has been recast into a code, the authors have avowedly turned to the Roman *Corpus Juris* as their model. In England, the influence of the Roman law has been less direct, but scarcely less penetrating.

In the diversity of Courts existing before the Judicature Acts, this influence was diversely exhibited. The Common Law Courts were little affected by it. They had precedents enough of their own reaching back for a period beyond the memory of any other Court. In the early days of the Admiralty and Ecclesiastical Courts, and to a less degree in the Court of Chancery, texts from the Roman law were frequently cited. But when once Courts have been constituted with a jurisdiction covering that of all the old Courts, it becomes apparent that principles of law recognised by the old Roman jurists pervade much of our own jurisprudence. And the authors of many of the law reforms during the late reign have been those who, as leaders of the bar practising in the Courts of ultimate appeal from all parts of Her Majesty's dominions, had acquired a wider experience than could have been gained by the ordinary practice in the various English Courts of Common Law, Equity, etc. Their experience was not unlike that of the

old Roman jurists who had to deal with questions from all parts of the Empire; and it is in the spirit of the Roman Prætors that they conceived and carried out the reforms in law and procedure during the reign of the late Queen.

*SOVEREIGN AUTHORITY—LEGISLATIVE, EXECUTIVE,
JUDICIAL.*

Under a constitutional government, such as now exists in England and the countries which have governments framed on similar types, the "Sovereign," in the sense of the person or persons having the supreme authority, is not to be described in any short formula. It is enough for the purpose of explaining the principles of law, to show how the Sovereign power is exercised:—

Sovereign power in England is either, 1. Legislative, exercised by the Parliament; 2. Executive, exercised in the name of the King by the advice of responsible Ministers; or 3. Judicial, exercised by the authorised Courts of Judicature.

Strictly speaking, neither the Parliament nor the Executive Government, nor the Courts of Judicature have an absolutely supreme authority. The proceedings of the Courts of Judicature, as well as of the Executive Government, may be controlled or set aside by Act of Parliament. And the authority of Parliament, though paramount for the moment, is subject to the ultimate authority of the whole body of persons having the electoral franchise, who may in a new Parliament send representatives with an implied mandate to undo the work of their predecessors. Only the executive acts of the King under the advice of his Ministers in foreign relations are virtually binding on the body politic in general, and cannot be wholly undone by any subsequent Ministry.

1. The most important exercise of Sovereign power in this country is that of Legislation. This is by the joint act of the King, Lords and Commons, or, to use the formal, and sufficiently exact, language of the usual statutory preamble—the enactment by the King "by and with the advice and consent of the Lords Spiritual and Temporal, and Commons

in Parliament assembled, and by the authority of the same." In the case of an important measure, the proposed enactment, or "Bill," is brought in (usually) to the Lower House (the House of Commons) by the Ministers of the Crown. When passed in that House and in the House of Lords, the Bill becomes an Act by the Royal assent.

The Royal assent is now invariably given to a Bill brought in by the Ministry of the day, and passed by both Houses of Parliament. This is an inevitable consequence of the now well-established constitutional rules, (1) That the Royal prerogative must be exercised with the advice of the King's Ministers; (2) That, by the unwritten law, sometimes called the cabinet system, the Ministers of the Crown act as a single body with undivided responsibility; and (3) That it is essential to the existence of a Ministry that they have the support of the constituencies through their representatives in the House of Commons. It follows that a Bill which has passed through both Houses of Parliament must have the active support, or at least the tacit consent of the Ministry under whose advice the Royal prerogative is to be exercised.

In recent years it has been the habit of Parliament to delegate minor details of legislation to be dealt with by Orders in Council, or by some department of Government, or by Rules of Court framed by the judges, etc. In such cases Parliament reserves to itself the ultimate authority by enacting that the Orders or Rules so made shall (generally before coming into effective operation) be laid before Parliament, so as to give that body an opportunity of cancelling or altering them.

2. For executive purposes the Sovereign power in this country is exercised by the King (or Queen Regnant) under the advice of the responsible Ministers of the Crown (*a*). Here, again, the concurrence of the Royal person is not, in important matters, a mere form. In regard to foreign

(*a*) The rule of ministerial responsibility in England has been cynically described by a French writer with the expression: "Ils obéissent en présence

policy, especially, His (or Her) personal influence may be of great importance. Owing to the personal relations of Royalty in this and other countries in Europe, there are opportunities of informal communications which may play a not unimportant part in the political relations of states. And the late Queen Victoria, by Her personal relations with foreign princes, by Her strong common sense, and by Her constant attention to business for a period beyond the political recollection of Her oldest Minister, acquired a position of influence which no Minister could ignore. The political relations of the late Queen to Her Ministers were brought to an issue (in 1850) when Lord Palmerston held the seals of the Foreign Office. The Queen, who then had the advantage of the Prince Consort's advice, insisted that, not only the drafts of all important despatches upon foreign affairs should be submitted to Her for approval, but that She should be timely informed of the intended line of action to which She was expected to give her sanction (*a*). Queen Victoria, fully imbued with the principles of the Constitution, always maintained the right to criticise and advise, but left the ultimate decision to the responsible Minister. It may be left to future history to speak of the effect of this personal influence in the present reign; it is enough to say that there is no sign of such influence having been lessened.

3. In this and other countries where law exists in the sense above defined, the judicial functions of the Sovereign are of an importance co-ordinate with the Legislative and Executive. Indeed, it is already apparent that rules having all the characters of law as above defined, are in England laid down by the Supreme Courts of Judicature as well as by the Supreme Legislature. The high authority accorded

de l'échafaud toujours dressé de Strafford." *Revue des deux mondes*, vol. 34, p. 360.

Another aspect of the rule finds a more genial expression in the lines of the English poet:—

"A land . . .
Where freedom slowly broadens down
From precedent to precedent."

(*a*) See "Life of the Late Prince Consort," by Sir Theodore Martin, vol. ii. pp. 301-310; and "Life of Queen Victoria," by Sidney Lee, *passim*.

to judicial rules in this country is bound up with the high character for independence which has generally marked the holders of high judicial office; and this, again, is often ascribed to the constitutional rule that the judges of the Supreme Court hold their office *ad vitam aut culpam*, and can only be removed by the King on the address of both Houses of Parliament.

The judicial authority, as affecting the individual, is commonly exercised with the aid of executive officials associated with the Judicial Courts. The initial proceeding is usually the summons, or command, issued out of the proper office in the King's name, requiring the appearance of the person charged. Then come the pleadings, then the hearing, followed by the judgment, with or without the assistance of a jury, and, lastly, the execution on the judgment, to be carried out, if necessary, with the aid of the sheriff or other executive officer. In criminal cases the accused may sometimes be apprehended on a warrant, followed by proceedings which compel him to submit to a trial ending in the judgment or sentence of the Court to be carried out by the sheriff (or his deputy) in due course of law. In the execution of his office, the sheriff may call for such assistance as may be necessary.

Modern English law is comprised (practically) in two branches—statute law and judiciary or case law.

Statute law consists of rules expressly enacted by the Sovereign Legislature, directly or by delegation, as above described. Judiciary law consists of rules impliedly laid down by Courts of Justice. Most of the law arising from particular customs has, by this time, become part of judiciary law. It is true that, even in England, a custom, *if reasonable, certain, and sufficiently known to the parties concerned*, is enforceable as law; and the function of the Court is to *declare* it to be *good* and enforce it accordingly. But when once proved and declared, it becomes part of the law established by judicial precedent; or, to apply, in an analogous sense, a rule applicable to a debt followed by a judgment—*transit in rem judicatam*.

CHAPTER II.

OF THE TERRITORIES GOVERNED BY ENGLISH LAW.

THE subject-matter of this treatise is the principles of English law; that is to say, of the law administered in the territory to which the writs of the King, as King of England, run. By the Statute of Wales, 12 Ed. I., this territory was made to include Wales, and sheriffs were appointed for Welsh counties to carry out that object. That Act contained certain reservations as to Welsh customs and laws; but these were, for the most part, abrogated by the Statutes of Henry VIII. (27 Hen. VIII. c. 26 and 34 & 35 Hen. VIII. c. 26). So that it may be now said, generally, that Wales is included in the territory subject to English law. And, by the Statute 20 Geo. II. c. 42, s. 3, the expression "England" in any Act of Parliament is to be taken as including Wales and the town of Berwick-on-Tweed.

The domain of English law, in the sense of the territories where English law is applied to many of the questions that may come before the Courts of Judicature, is not confined to the territory to which the King's writ, as King of England, runs. To a greater or less degree it may be said that English law, or the influence of English law, extends to all parts of His Majesty's dominions.

SCOTLAND.

As to Scotland, there was, at an early period, a great similarity in the laws (so far as the King's writ would run) with the laws of England. The feudal tenures were similar; so were the titles of nobility, and the rules of descent of the Crown. Many forms of writs employed at an early date in Scotland were substantially copied from the common-law writs current in England in the twelfth century. And, in an uncritical age, a book, purporting to be a work on Scotch law, and for the most part copied from Glanville's Treatise,

de legibus Angliæ, was long regarded as a genuine and ancient book of authority upon the law of Scotland (a).

Notwithstanding so much that was similar in the origins of what may be called the common law in the two kingdoms, there had, before the Act of Union, taken place a wide divergence.

The Court of Session—the only Superior Court of Civil Jurisdiction in Scotland—was newly created in 1532. Unfettered by recorded precedents of their own, or by technical pleadings (b), the Court was the more ready to listen to arguments on principles of law. The sources which came to be most used were those of the Roman Law as expounded by the great Dutch jurists. Much of Scotch law still bears the impress of this influence.

In Statute law the divergence is no less marked. No statute of *Quia Emptores* has interfered with subinfeudation. And “feuing” is still the usual mode of setting out a building estate. A system of registration of titles, effective though expensive, has been founded on the seisin (or sasine). And this affords great security to purchasers, (1st) because possession without recorded seisin is no evidence of title, and (2ndly) because the seisin cannot be automatically shifted, as it may be under the English Statute of Uses. On the other hand, a statute was passed (in 1685) enabling proprietors of land to effect a strict entail, which can only be broken by proceedings in the Court of Session under the authority of modern statutes.

Owing to the different course of the Reformation in the two countries, the laws relating to the Established Church in either country became widely divergent.

By the Articles of Union, confirmed by the Act (c) for the Union of the kingdoms of England and Scotland, it is declared (Art. 18): “That the laws concerning regulations of

(a) The “*Regiam Majestatem*.” See Prof. Cosmo Innes’ Preface to *Acts of Parliament of Scotland*, vol. i. (1844).

(b) Although many of the forms of writs in early use were borrowed from England, the only rule of pleading was that the defender should be informed “of the debatable matter whereanent the summons is made.”

(c) 1707, 6 Ann, c. 11.

trade, customs, and excises to which Scotland is, by virtue of this treaty, to be liable, be, the same in Scotland, from and after the Union, as in England; and that all other laws in use within the kingdom of Scotland do, after the Union and notwithstanding thereof, remain in the same force as before (except such as are contrary to or inconsistent with this treaty), but alterable by the Parliament of Great Britain." By the 19th Article provision is made for the maintenance of the Courts of Judicature in Scotland as separate Courts from those of England.

By the same Act of Union two Acts of Parliament are recited; the one of Scotland, whereby the Church of Scotland and also the four universities of that kingdom are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, whereby the Acts of Uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by Parliament at that time) and all other Acts then in force for the preservation of the Church of England, are declared perpetual.

With the few exceptions, therefore, of matters of special interest for Englishmen, little further mention will be made of the law of Scotland. It is, however, to be observed that, not only have the decisions of the English Courts, so far as relates to matters of common principle, a weight of opinion not lightly to be disregarded in Scotland: but on many subjects the decision by the House of Lords, as the Court of ultimate appeal for England, stands as an authority for Scotland so far as the *ratio decidendi* applies. And the same remark applies to the decision of the House of Lords in a Scotch appeal, as an authority in English law.

The town of Berwick-on-Tweed was originally part of the kingdom of Scotland: but is now to all intents and purposes an English town, and is accordingly represented by burgesses in the House of Commons.

IRELAND.

In Ireland, speaking generally, the authority of English law is more extensive. As to the mode in which the English

common law was first introduced into Ireland, much is left to conjecture.

The generally received tradition attributes the beginning of English law as applied to Ireland, to the reign of Henry II., who is said to have invaded Ireland with great pomp, and obtained the submission of many of the chiefs of septs or clans (*a*). It has been alleged that before making his return voyage (in 1172) he convened a council at Lis-more, and that, there and then, in the name of Ireland, those present accepted, and swore to be governed by, the English laws (*b*). Without attaching too much importance to the alleged acceptance of the English laws, it may be surmised that what Henry II. did before setting sail for England amounted—or was by the lawyers of a subsequent reign construed as amounting—to an intimation to his Irish subjects of his intention that they should thenceforth be governed by English law. And this hypothesis receives some colour from the circumstance that the limitation of time fixed by letters patent (1205) of King John (*c*) for the writ *de morte antecessoris* (for small tenements) authorised to be issued by the justiciar in Ireland, was the date of the voyage (“transfretatio”) of Henry II. (in 1172) from Ireland to England.

In the reign of King John we find in Ireland a justiciar, and sheriffs appointed for twelve counties which were assumed to comprise the territory through which the King’s writ would run. In the same reign, the justiciar was authorised, by the letters patent (1205) above mentioned, to issue certain special writs relating to comparatively small tenements, or urgent cases. It may be inferred that writs relating to larger tenements (such as for a whole

(*a*) See Giraldus Cambrensis, *in loco*.

(*b*) Matth. Paris, Hist. Angl., Anno 1172, p. 126.

(*c*) Anno 1205, Pat. 6, Johan Regis, m. 6. Rot. Litt. Pat., p. 47. This must have been in conformity with the practice, at the time, of the English Chancery in regard to Irish writs. At a later period, the Chancery officials appear to have fallen into the habit of using, in regard to Ireland, the English limitation dating from the coronation of Henry II. See Pat. 6, Hen. III., p. 1, m. 2. Sweetman, Cal. (1171-1251), No. 1042.

knight's fee) were issued by the Chancery in England, there being as yet no chancellor in Ireland.

Subsequently, in the year 1227 (Hen. III.), there was sent over to Ireland from the English Chancery a document containing in a schedule a register of English writs for use in Ireland (a).

At a later date, June 18, 1246, in the reign of Henry III., the machinery of justice was completed by the appointment of a chancellor for Ireland, who is to bear the King's seal for the issue of all writs which run throughout the whole kingdom (b). And, by letters patent in the same year (September 9, 1246), the laws and customs of England, generally, were declared to apply to Ireland; and directions were given that all writs of the common law which run in England do similarly run in Ireland (c).

How the laws were administered by the judges in Ireland in these early times, we have, in the absence of any record like the English Year Books, no means of ascertaining; but it may be supposed that they applied, as best they could, the practice and precedents of English law. At a later period, a potent influence to keep the Courts in touch with English practice was the institution of the King's Inns in Dublin; and still more important is the Irish Act of 1542 (33 Hen. VIII. sess. 2, c. 3, made perpetual by 11 Eliz. sess. 1, c. 5), by which persons entitled to plead for another in any of the King's Courts must be (d) years previous thereto "demurrant and resiant" at one of the English Inns of Court "studying, practising, or endeavouring themselves, the best they can, to come to the true knowledge and

(a) MS. in British Museum (Cotton, Julius D. 11, f. 1436). See Prof. Maitland thereon. *Harvard Review*, vol. iii. pp. 110, *et seq.*

The schedule, as Prof. Maitland observes, appears to have been carelessly copied from a register in use in the reign of King John, and without correction for the (then present) reign of Henry III. Nor, it may be added, was any trouble apparently taken to adjust the forms for use in Ireland. So the limitation of time for the writ "mort d'ancestor" is left as the coronation of "H. patris mei" (sc. Henry II.).

(b) Close, 30 Hen. III. m. 9; Sweetman, Cal. (1171-1251), No. 2836, at p. 424.

(c) Pat. 30, Hen. III., m. 1 (also calendared by Sweetman, No. 2850, p. 426).

(d) The blank is in the statute as printed.

judgment of the King's laws." This requirement was only removed by the Barristers Admission (Ireland) Act, 1885 (48 & 49 Vict. c. 20).

The effect of this wholesale introduction of the common law of England, upon the title to land in Ireland, is illustrated by "The case of Tanistry" in the King's Bench (in Ireland, 1607, 5 Jac.) reported by Sir John Davies, the King's Attorney-General in Ireland (*a*). By this time, and since the first year of King James I., the King's writ ran through the whole of Ireland.

By the custom of tanistry, as found in the case, the lands in question "ought to descend, and have time out of mind used to descend *seniori et dignissimo viro sanguinis et cognominis* of the person who died seised." It appears to have been assumed that the person claiming as "thanist" under this custom was the head of the clan or sept chosen by election, and that he would hold as trustee for the benefit of the sept according to their usages.

The custom of tanistry was alleged to have been part of the Brehon law—the common law of the Irish people before the conquest; and it was admitted in the arguments that, having regard to the establishment in Ireland of the common law of England, the custom could only be supported as a particular custom, on a similar footing to the custom of gavelkind in Kent, or some of the customs of Welsh land which survived the statute of Edward I. The question having to be placed on this narrow footing, it was not difficult to show that, judging by English notions, the custom was unreasonable and uncertain, as well as contradictory to the common law, and so was void. This was the view taken by the judges, and, although the case itself was ended by a compromise, the legal effect was to make the English common law paramount in questions of land tenure throughout Ireland.

Statute law in Ireland stands on a different footing. The authority of the English or British Parliament was never admitted in Ireland, so long as Ireland had, in name

(*a*) Dublin, 1674; English translation, Dublin, 1762.

at least, a Parliament of her own. But the Irish Parliaments were from the outset so constituted that English influence predominated; and, in the tenth year of King Henry VII., the Irish Parliament passed a statute (10 Hen. VII. c. 22) commonly called (after its promoter, the English Deputy of the time) "Poyning's Act." By this Act, after a recital of the benefits derived by England from her statute law, it was enacted that "all statutes late made within the realm of England, concerning or belonging to the common and public weal of the same, from henceforth be deemed good and effectual in the law, and be accepted, used and executed within the land of Ireland at all points at all times requisite according to the tenor and effect of the same." By another of the series of Irish Acts, sometimes referred to as "Poyning's Laws" (10 Hen. VII. c. 4), explained and confirmed by an Act in 1556 (5 Ph. & M. c. 4), the mode of summoning Parliaments in Ireland, and their legislative powers, were so regulated as to bring them into complete subservience to the English Government, exercised by the King in Council.

It was long a subject of controversy whether the English or British Parliament had any power, by a statute made subsequently to Poyning's Act, to legislate for Ireland. Such a power was frequently asserted in England, and the assertion was embodied in a declaratory Act in the year 1719 (6 Geo. I. c. 5) (*a*). The power was always strenuously denied in Ireland; and the controversy remained acute (*b*) until the year 1782, when the British Government and Parliament found it convenient to concede the claim to legislative independence made on the part of Ireland; and

(*a*) This Act also declared that the Irish House of Lords had no jurisdiction to review judgments of the Courts in Ireland. This also had been, and continued to be, a subject of acute controversy. On the repeal, in 1782, of this Act of 6 Geo. I., the jurisdiction of the Irish House of Lords to entertain appeals from the Irish Courts became inferentially conceded, and this jurisdiction, under the Act of Union, naturally devolved upon the House of Lords of the United Kingdom as the successor, for Irish purposes, to the Irish House of Lords.

(*b*) The salient points of this controversy are stated in an "Historical Review" by the Right Hon. J. T. Ball (1888). Longmans.

certain concessions were made by the Irish Parliament on the other side.

By the Act of the British Parliament (1782) 22 Geo. III. c. 53, the Act of 6 Geo. I. c. 5 was repealed; and by an Act of the Irish Parliament (21 & 22 Geo. III. c. 47, Ir.) the independence of the Irish Parliament to initiate, as well as to carry out (a) legislation for Ireland, was declared. By a simultaneous Act of the Irish Parliament (21 & 22 Geo. III. c. 48) it was enacted that effect should be given in Ireland to all previous statutes in England or Great Britain, so far as relates to enactments (1) affecting private title to land in Ireland, (2) concerning commerce, where equal restraints are imposed upon, or equal benefits given to, the subjects of England and Ireland, (3) concerning the seamen of both countries, or (4) concerning the style or calendar of the year, the making of oaths, etc., and the continuance of offices, etc., on a demise of the Crown.

To give full effect to the concession of the independence of the Irish Parliament, it was, however, considered not enough to repeal the Act of 6 Geo. I.; but, further, by an Act of the British Parliament of the following session (23 Geo. III. c. 28), on the recital that "doubts had arisen whether the provisions of the Act (22 Geo. III. c. 53) were sufficient to secure to the people of Ireland the rights claimed by them to be bound only by laws enacted by His Majesty and the Parliament of that Kingdom, it was declared and enacted that the right claimed by the people of Ireland to be bound only by laws enacted by His Majesty and the Parliament of that Kingdom in all cases whatsoever . . . should be established and ascertained for ever" (b).

So matters continued until the Act of Union of 1800 (40 Geo. III. c. 67, G.B.; and 40 Geo. III. c. 38, Ir.), by which the Parliament of the United Kingdom was constituted, with supreme legislative authority for Ireland as

(a) One condition only was imposed, namely, that (in addition to the Royal assent being given in Ireland) the Bill, *as passed* by the *Irish Parliament*, should be returned under the Great Seal of Great Britain.

(b) The Act further declared against a practice, which had also been the subject of controversy, of bringing up the judgment of Courts in Ireland, by appeal or writ of error, to English Courts.

well as Great Britain. Whether a particular statute passed since the Union is to bind Ireland depends, of course, upon the intention of the statute. Where there is no indication to the contrary, the statute presumably applies to the United Kingdom generally.

ISLANDS IN THE BRITISH SEAS.

Of the islands in the neighbouring sea, those immediately adjacent to England, such as the Isle of Wight, of Portland, of Thanet, etc., are comprised within the neighbouring counties and are parts of England to all intents and purposes. The Scilly Isles are part of the county of Cornwall, but owing to their greater distance from the main land, and for certain purposes, namely, as to the appointment of justices of the peace, and in regard to local government, they have been made, under Acts of Parliament, subject to separate treatment. (See 4 & 5 Vict. c. 43 (1834); 51 & 52 Vict. c. 41 (1888), s. 49; 56 & 57 Vict. c. 73 (1894), s. 74.) So there are numerous islands (including the Orkney and Shetland islands) comprised in the various sheriffdoms or counties of Scotland and Ireland; and these are, to all intents and purposes, included in the United Kingdom.

The Isle of Man has a separate history, having been formerly a subordinate feudatory kingdom, subject to the Kings of Norway, afterwards to the Kings of Scotland, and subsequently claimed by right of conquest by Henry IV., and enjoyed under grants of the English Crown by various persons, whose rights were eventually purchased so as to become inalienably vested in the Crown under statutes 5 Geo. III. c. 26 and c. 29. There has long been a local legislature in the island called the "House of Keys"; and an Act of the Parliament of the United Kingdom does not extend to the island unless it is specially named; nor does process run there from the English Courts. But it is part of the King's dominions (and not his "foreign dominions" within the Act 25 Vict. c. 20), so that the King's writ of *habeas corpus* runs there (in the matter of *James Brown*, 1864, 33 L. J. Q. B. 193; *Crawford's Case*, 1849, 13 Q. B. 613).

And for the purposes of the Fugitive Offenders Act, 1881, the island is part of England and of the United Kingdom (44 & 45 Vict. c. 69, s. 37).

The islands of Jersey, Guernsey, Alderney, and Sark, and their appendages, commonly called the "Channel Islands," were formerly parcel of the Duchy of Normandy. They are governed by their own laws, founded on the ducal customs of Normandy; and of these there is a collection in an ancient book called *le Grand Coustumier*. The ordinary process of the English Courts is of no effect in these islands. But, no doubt, the King's writ of *habeas corpus* runs there (*a*), as it does in the Isle of Man; and for the purposes of the Fugitive Offenders Act, 1881, the islands are part of England and of the United Kingdom.

COLONIES AND DEPENDENCIES.

The possessions and dependencies under the Flag of the United Kingdom, in other parts of the world are comprised shortly in the expression *Colonies* and *British India*, using these expressions with the meaning assigned to them by the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 18).

Of the Colonies, there are two leading types. Some have been acquired from other states by conquest or treaty; others have been acquired by occupancy only—that is, by finding them desert and uncultivated and peopling them from the mother-country. In the former case, the government is usually (*b*) taken over on the terms that the general rules of law to be administered in the Colony are those already prevailing there at the time of the cession or conquest. In the latter case the colonists are presumed to have taken with them, and to be governed by, the laws of the mother-country so far as these are suitable to their

(*a*) See *per* Lord Mansfield, *R. v. Cowle*, 2 Burr. 856.

(*b*) In the absence of any express terms, this would be presumably the case. Whether the presumption, or even a general expression in a treaty of cession, can extend to the permission of such a practice as torture to compel evidence was a question raised, but never finally decided, in the case of *Rex v. Picton* (1804), 30 St. Tr. 225.

situation. In either case the laws may be modified by subsequent legislation of the competent authority (a).

Of the former class of Colonies, that part of Canada originally acquired by conquest from the French may be taken as an example. The law there is based upon the French law existing at the time of conquest. Of the latter class the Australian Colonies may be mentioned as the type. Not that they were entirely unpeopled on the arrival of the colonists; but the aboriginal inhabitants were too sparse and of too low a type to be taken account of in the subsequent development of the Colony. Intermediate between these two types are those where colonists have occupied a country having already a native population not inconsiderable or contemptible, but too weak or too little organised to resist the gradual pressure of the colonists. In such a case, a *modus vivendi* has been found by a system of law based generally upon English law, but allowing to the aborigines within certain limits the reasonable enjoyment of their own customs and modes of tenure. Such is the case in the North Island of New Zealand.

Another salient distinction between the Colonies is this. In some Colonies a legislative body has been established in the Colony itself. The Legislative Assembly is summoned by writs issued by the Governor of the Colony as H.M.'s representative there, under the powers of the Act of Parliament, Letters Patent, or other Instrument by which the legislative powers are constituted. Where no legislative powers have been constituted for the Colony,—and whether the Colony has been acquired by cession or conquest, or by occupation (b),—H.M. in Council has complete legislative authority in the Colony. But when once the representative legislature has been constituted, the power of H.M. in Council to legislate for the Colony is at an end.

(a) See these points fully discussed in an "Essay on the Government of Dependencies," by George Cornwall Lewis. (John Murray, 1841. The same, edited by C. P. Lucas, Clarendon Press, Oxford, 1891.)

(b) It is only in the case of Colonies acquired by occupancy that this power of H.M. appears to have been doubted. The doubt is removed

It has never been doubted that the Parliament of the United Kingdom has, in all cases, supreme authority to legislate for all the Colonies. To have effect in the Colony—and particularly to have the effect of rendering void any subsequent repugnant enactment by the Colonial Legislature—the intention of the Imperial Statute to apply to the Colony must be expressed, or appear by necessary implication (*a*).

It need hardly be said that this power of legislation by the Imperial Parliament, in the case of a Colony possessing its own Legislature, is to be exercised with extreme caution. The sentiment of loyalty in most of the Colonies is very strong, but could not always be warranted to bear the strain of arbitrary interference with the material interests of the Colony.

All colonial legislation is subject to an effective veto in the Crown exercised under the advice of the Ministry at home. The reasons above stated (*b*) why the Royal assent is now invariably given to a Bill passed by both Houses of the Imperial Parliament, obviously do not apply to a colonial legislative body, on whom the Ministry at home are not dependent for their existence. It is undoubtedly within the powers of constitutional law for the Governor of a Colony, as H.M.'s representative there, under the advice of the Ministry at home, to delay or prevent, by the use of the Royal prerogative of veto, the passing of a measure which the Ministry consider to be calculated injuriously to affect the interests of H.M.'s subjects generally. It is usual in the instructions given to a Colonial Governor to authorise him to assent in H.M.'s name to such measures as are not repugnant to an Imperial Statute, and only concern the colonists who are represented in the Colonial Legislative Assembly. Bills which do not clearly appear to fall within these conditions are referred home. If the Bill contains anything clearly repugnant to an

by the British Settlements Act, 1887 (50 & 51 Vict. c. 54), superseding the repealed Acts therein mentioned.

(*a*) See the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63, s. 1).

(*b*) See p. 4, *supra*.

existing Imperial Act, the Ministry are morally bound to advise that the Bill be not passed in that form; and further, if the Bill contains provisions which in their opinion are calculated injuriously to affect H.M.'s subjects generally, or classes of H.M.'s subjects who are not represented in the Colonial Legislature, they are clearly justified in advising that the Bill do not pass.

From all Courts of Judicature in the Colonies there lies an ultimate appeal to H.M. in Council, which is always referred to the Judicial Committee (*a*), consisting of Privy Councillors holding, or who have held, high judicial office. The circumstance that many of these are, or have been, judges trained in English law, makes for the application of the principles of English law where no conflicting rule is prescribed by, or can be inferred from, the local law.

BRITISH INDIA.

It remains to speak of British India, employing the term, as defined in the Interpretation Act, 1889, as including "all territories and places within H.M.'s dominions which are for the time being governed by H.M. through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India."

By an Act of the British Parliament in 1707 (6 Ann. c. 71), the East India Company (*b*) were incorporated, and confirmed in the exclusive privilege of exclusive trading and carrying on factories in the East Indies, already exercised by two existing companies who by this Act became merged in the Company.

While endeavouring to maintain their existence as traders the Company came into conflict with native powers, and with rival European traders who combined with native powers in the endeavour to oust the English. In these conflicts

(*a*) See the Judicial Committee Act, 1833 (3 & 4 Will. IV. c. 41).

(*b*) The corporate name under this Act was "The United Company of Merchants of England trading to the East Indies." The name "East India Company," by which the Company was generally known, was adopted as its formal title by the Act of 1833 (3 & 4 Will. IV. c. 85, s. 111).

the English Company came off best, and consequently became administrators and virtually the sovereign power over large territories in India. Next they had to maintain these territories, inhabited by an unwarlike people, against the stronger and more warlike races of the west and north-west. And step by step the power of the Company became paramount over the whole of India.

Sovereign as the Company thus became in India, they were still the subjects of the Crown at home; and the British Parliament had the undoubted right to legislate upon the constitution of the Company and the government of the territories administered by them.

Of the Acts of Parliament passed during the administration of the Company, it will be sufficient to note here those which materially affected the government of India.

By the East India Company Act, 1772 (13 Geo. III. c. 63), rules were laid down prescribing the manner in which Directors of the Company should be chosen from among its members, and the qualification which should entitle a member to vote in its affairs. By the same Act, the civil and military government of the presidency of Fort William in Bengal, and the management of the territorial acquisitions and revenues in the kingdoms of Bengal, Behar, and Orissa, were vested in a Governor-General and Council nominated (*a*) by the Act for five years, and thereafter to be nominated or removed by the Directors of the Company. The Governor-General and Council were to control the government of the other presidencies so far as relates to making war upon, or making treaties with, Indian princes or powers. By the East India Company Act, 1784 (24 Geo. III. c. 25), the government of the East Indies was brought under the control of Commissioners appointed by the Crown, including one of H.M.'s principal Secretaries of State. This body was afterwards generally called the "Board of Control."

(*a*) The Governor-General nominated was Warren Hastings. The four Councillors were John Clavering, George Munson, Richard Barwell, and Phillip Francis.

By the Government of India Act, 1833 (3 & 4 Will. c. 85) the implied relation of the Crown to the territories held by the Company in India was, for the first time, formally expressed. It was enacted that from and after the 22nd of April, 1834, these territories, and all other property of the Company (only charged with their debts and a fixed dividend upon the Company's stock), should remain and be vested in the Company *in trust for H.M., his heirs and successors, for the service of the Government of India.*

By the same Act the trading privileges of the Company, which had been already, by an Act of 1813 (53 Geo. III. c. 155), restricted to the China tea trade, were put an end to, and the Company were to close their commercial business. By the same Act the Board of Control was modified and enlarged by the addition of a number of Ministers of the Crown as *ex-officio* members of the Board.

By sect. 39 of the same Act the superintendence, direction, and control of the whole civil and military government of all the said territories and revenues in India were vested in a Governor-General and Councillors, to be styled "The Governor-General of India in Council."

By sect. 40 the Council were to consist of four ordinary members, three of them servants of the Company of at least ten years' standing, and the fourth to be appointed from amongst persons not servants of the Company, by the Court of Directors, subject to the approbation of H.M., to be signified in writing by the Royal sign-manual, countersigned by the President of the Board of Control. The fourth member was only to be entitled to sit and vote at the Council at meetings for making laws and regulations, and was accordingly usually called "legislative member." The first legislative member, appointed under the power of this Act, was Thomas Babington Macaulay (afterwards Lord Macaulay).

By sect. 42 of the Act of 1833 all vacancies in the office of Governor-General of India were from time to time to be filled up by the Court of Directors, subject to the approbation of H.M., to be signified in writing by the Royal sign-manual, countersigned by the President of the Board of Control.

And by sect. 43 the Governor-General in Council was empowered to make laws and regulations, whether repealing, amending, or altering existing laws or regulations, or making new ones, with certain reservations especially directed to preserve the prerogative of the Crown and the paramount authority of Parliament. But by sect. 44 the Court of Directors, subject to the authority of the Board of Control, might disallow any such laws and regulations, and in that case the Governor-General in Council must repeal them.

By the same Act of 1833 (3 & 4 Will. IV. c. 85, ss. 1 and 2) the term for which the territories of India were to remain under the government of the Company was limited to the 30th of April, 1854. But by the Government of India Act, 1853 (16 & 17 Vict. c. 95) the government of the Company was, subject to the provisions of that Act, continued until Parliament should otherwise determine. By this Act (amongst other provisions) the directors, called the "Court of Directors," were to consist in part of nominees of the Crown; the legislative member of Council in India became a member of Council (since called "legal member") for all purposes; and for legislative purposes the Council was enlarged; the patronage of the Directors for the services in India was put an end to, and arrangements were authorised to be made for admission to the services by examination.

It was already apparent that the time was at hand for the government of India to be placed more directly under the Crown. But the final measure was precipitated by unforeseen events. The Mutiny of the Native Army, assisted by the open or covert support of some of the great landowners, particularly in the then recently annexed province of Oudh, and the reconquest of India by the Army of the Queen with the loyal remnant of the old Indian Army, and the loyal Sikhs, presented the occasion for the Statute of 1858 (21 & 22 Vict. c. 106), by which the territories of the East India Company and the government of India, and all powers then lately exercised by the Company, became vested in, and to be exercised by and in

the name of Her Majesty; and the Secretary of State (for India) succeeded to all the powers of the old Court of Directors as well as of the Board of Control. The Secretary of State was to be assisted by a Council of fifteen, at first including seven of the Directors of the old Company—vacancies among these to be filled up by election of the Council—and eight to be appointed by the Crown. It was provided that a majority of the Council should always consist of persons who had served or resided for at least ten years in India. Provisions were made whereby, in case of difference of opinion in the Council, the decision should ultimately rest with the Secretary of State; and in political affairs the authority of the Secretary of State was always supreme.

The powers of the Governor-General of India (*a*) and his Council were not defined in the Act of 1858, and it was left to be implied that, subject to the paramount authority vested in the Secretary of State, they remained as before.

By the Indian Councils Act, 1861 (24 & 25 Vict. c. 67) (*b*), these powers are expressly defined and regulated. By the 22nd section, as amended by an Act of 1865 (28 Vict. c. 17, ss. 1, 2), the Governor-General of India in Council is empowered (subject to the provisions of the Act) to make laws and regulations for all persons and things within British India, as well as for all British subjects of H.M. within the dominions of Princes and States in India in alliance with H.M.: provided that (in short) such laws and regulations—

- (a) should not be repugnant to any Act of Parliament relating to India; and
- (b) should not affect the authority of Parliament, or any part of the unwritten law of the United Kingdom,

(*a*) As the representative of H.M. in India, and particularly in his relations to Indian princes outside of British India, he is called Viceroy. As head of the administration of British India his statutory title is "Governor-General of India."

(*b*) Amended by subsequent Acts (of 1865) 28 Vict. c. 17; (1869) 32 & 33 Vict. chapters 97, 98; (1870) 33 & 34 Vict. c. 3; (1871) 34 & 35 Vict. c. 34; (1874) 37 & 38 Vict. c. 91; (1876) 39 & 40 Vict. c. 7; (1892) 55 & 56 Vict. c. 14.

whereon might depend the allegiance of any person to the Crown, or the Sovereignty of the Crown, over any part of British India.

By sect. 20 of the same Act, when a law (or regulation) has been passed at a meeting of the Council, the Governor-General may—

- (a) declare that he assents; or
- (b) declare that he withholds his assent; or
- (c) reserve the same for the signification of H.M.'s pleasure thereon.

And by sect. 21, where the law has been assented to by the Governor-General, he shall transmit an authentic copy to the Secretary of State for India; and H.M. may, through the Secretary of State, signify disallowance of the law; and the disallowance annuls the law from the date when the Governor-General makes known by proclamation, or by signification to his Council, that he has received notification of the disallowance. Of course, where there would be any doubt as to the decision of the Secretary of State, the Governor-General will, in his discretion under the 20th section, reserve the matter, so that the inconvenience of a law being in force for a time, and subsequently nullified by disallowance at home, should be avoided. By the 23rd section power is given to the Governor-General, in cases of emergency, to make ordinances, having the force of law during a period of six months, or until disallowance by H.M., or unless superseded by a law or regulation made in the regular course.

The existing High Courts of Judicature in India have been established under the authority of the Indian High Courts Act, 1861 (24 & 25 Vict. c. 104). They succeed to the jurisdiction of the Courts formerly established by Royal Charter, as well as to that of the higher Court existing under the rule of the Company, and carrying on the traditions of the old native Courts. In all civil cases there lies an ultimate appeal to H.M. in Council, exercised through the Judicial Committee under the Judicial Committee Act, 1833 (3 & 4 Will. IV. c. 41).

It has always been the principle acted on by the Courts of Judicature in India, as well in the time of the Company, as under the Crown, to preserve intact the laws and customs of the natives in all matters touching their various religions. The law of inheritance, especially in regard to intestate succession, being intimately associated with religion—particularly amongst the three great sects of Hindhus, Mahommedans, and Buddhists—is accordingly administered according to the native customs. The tenure of land depends partly on the old native customs, so far as the judges have been able to understand them; and partly on the various land settlements, made upon surveys (somewhat in the nature of our own “Domesday”) based partly upon the facts of possession and native custom, and partly upon considerations of policy for security of the land revenue and the settlement upon the land of a loyal population. All these matters are outside the domain of English law. But in other matters, such as contracts, trusts, etc., and especially in regard to evidence, it was inevitable that judges, following the lead of the Courts constituted by charter, and the High Courts, largely composed of lawyers with English training, should be much influenced by the rules of English law. And the powers of the Governor-General of India in Council under the Acts of 1833 and 1853, confirmed and extended by the India Councils Act, 1861 (and amending Acts), afforded an unique opportunity for importing English law, codified and adapted in various branches to the circumstances of India, as a guide to the Courts in all cases to which the laws so laid down can be applied.

This codification was inaugurated by the Commission constituted under the powers of the 53rd section of the Act of 1833 (3 & 4 Will. IV. c. 85). The original Commission consisted of T. B. Macaulay (Lord Macaulay), J. M. Macleod, G. W. Anderson, and F. Millett, and their first work was to make a draft of a penal code. This draft (substantially Macaulay’s, but settled after discussion with the legal experts associated with him) ultimately became embodied in the Indian Penal Code of 1860.

It was only after a new commission had been issued under the Act of 1853 (16 & 17 Vict. c. 95, s. 28) that a serious endeavour was made to give practical effect to the project of codification. The first measure of the kind to become an Act was the Code of Civil Procedure (Act 8 of 1859) (a). This was followed by a Limitation Act (10 of 1859). Then followed the Penal Code in 1860, and the Code of Criminal Procedure in 1861. In 1865 the Indian Succession Act (drawn by Macpherson) was carried through by Sir H. S. Maine. A Limitation Act, and a Contract Act (drawn by Macpherson), were carried through by Sir James F. Stephen in 1871. And the Indian Evidence Act, a notable piece of work by Sir J. F. Stephen, was carried through by him in 1872. Many other Acts of the same character have been carried out by the Legislative Council under the initiative of the Legal Member for the time; and the result is a Code of Civil and Criminal Law and Procedure, based in the main upon English Law, with the advantage of explicit statement and intelligent arrangement. These Acts, which are collected, arranged, and commented on by Mr. Whiteley Stokes in two volumes dealing with substantive law and procedure respectively, comprise the following topics:—

Substantive Law.

Penal Code (1860, with amendments by subsequent Acts).
 Indian Succession (1865).
 Contract (1872).
 Negotiable Instruments (1881).
 Transfer of Property (1882).
 Trust (1882).
 Easements (1882).
 Specific Relief (1877).

Adjective Law.

Criminal Procedure (1882).
 Civil Procedure (1882).

(a) Subsequently amended and embodied in an Act of 1882.

Evidence (1872).

Limitation (1877).

(And other Acts mainly concerned with Revenue.)

CHAPTER III.

GENERAL ARRANGEMENT OF TOPICS.

THE principles of law may be treated under two general heads:—(1) *Substantive law*, comprising the primary rules of conduct enforceable by law, and (2) *Adjective law* or *Procedure*, comprising the remedies where the rules of substantive law have been broken or a breach is threatened.

Substantive law, again, has been sometimes regarded as consisting of two great branches, namely, first of the duties which each person owes to all persons alike, and of the rights which each person is entitled to maintain against all persons alike; and, secondly, of the rights and duties which specially concern two or more certain persons, and are enforceable by and against such persons reciprocally. This division of rights roughly corresponds to those which are included in the terms *status* and *property* on the one hand, and *obligation* on the other.

STATUS, PROPERTY, OBLIGATION.

Status and *property* have this in common—that the rights dealt with are rights of persons available against persons generally, as distinguished from *obligations*, which relate to rights of persons available against certain other persons. Both *status* and *property* involve duties which the person holding the *status* or having the property owes to all other persons alike.

STATUS.

Status, as distinguished from *property*, includes rights belonging to persons, as a class, which are conveniently considered apart from the rights of persons considered as

individuals and not as belonging to any particular class of persons. They may also be regarded as rights of *property*, using the word in a large sense: that is to say, they are included in the class of rights which have been classed by some jurists under the not very appropriate phrase, "rights *in rem*," as distinguished from "rights *in personam*," which is an alternative and appropriate phrase to express rights answering to *obligations*. Take, as an instance, the *status* of parent or guardian in relation to the child or ward. He has rights over the child or ward which are available against persons generally, and have been therefore classed as "rights *in rem*," or *property* in the larger sense. He has also duties, such as the duty of education, etc., which he owes not only to the child, but to the community in general.

It is not possible, neither would it be of any practical use, to give an exact definition of the term *status*. It is enough that, from the various conditions which have been commonly regarded as constituting a *status*, a general impression may be formed as to what is meant by the term.

While upon the general topic of *status*, it may here be observed that the modern student of English law is entirely relieved from the distinctions which formerly existed, and which occupy so large a part of the Roman law, between persons as of free or servile condition. Freedom to the full effect of the freedom enjoyed by a Roman citizen, is now the right by English law, not only of a person who is technically a British subject, but of every person living within the region where English law is administered. The conditions under which, in early English law, a large number of persons were born in servitude have, through economic causes (a), long disappeared. And it is an established principle of English law that no person can by contract bind himself to service of an indefinite nature for an indefinite time.

(a) Of these, the "black death" in the fourteenth century was probably a very cogent one. A modified system of restriction of freedom in the labouring population was at a later period attempted by what has been called the *law of settlement*. This system—so far as relates to personal liberty—became in course of time unworkable, and has long been obsolete.

The principle that a *status* of slavery cannot exist under English law was finally established, after elaborate discussion in the King's Bench, in the case of *James Somerset*, a heathen negro, in 1772 (a).

But it has required a long series of statutory enactments and declarations to make effectual the security now enjoyed by all against aggression by arbitrary authority, especially when exercised in the name of the Crown. First there is Magna Charta, obtained from King John and confirmed by his son Henry III., and by the statute (*confirmatio chartarum*) 25 Ed. I., and other corroborating statutes from King Edward I. to Henry IV. Then there is the Petition of Right, the Habeas Corpus Act, 1679 (31 Ch. II. c. 2) (b), and the Bill of Rights, embodied in the Act 1 W. & M. stat. 2, c. 2.

These are the laws which step by step secured the subject against the exercise of arbitrary power by the government. The rights so secured to all H.M.'s subjects have been classed as follows: (1) the right of personal security, including the enjoyment by every one, without interference by another, of life, bodily health, and reputation; (2) the right of personal liberty, or power of free movement without imprisonment or restraint, unless by due course of law; and (3) the right of property, consisting of the free use, enjoyment, or disposal of those things which a man has lawfully acquired, without control or diminution, except by the laws of the land.

Thus much of these general rights. It is only because they belong to everybody that they are not strictly to be regarded as appropriate to a *status*. Or, it would be true to say that all persons living under the protection of English law enjoy the *status* of free persons.

PROPERTY.

Property in the usual sense of the term may be described as the right which a person has in or over a certain thing,

(a) State Trials, and Lofft. 1. And see p. 90, *post*.

(b) Extended by the Habeas Corpus Act, 1816 (56 Geo. III. c. 100).

such right being protected by law against infringement by all persons other than the proprietor. All rights of property involve duties to other persons generally, e.g. *Sic utere tuo ut alienum non lædas*.

To the class of rights included in "property" it is convenient to assign rights which have some of the features of property as above defined, but to which that definition is applicable in a modified sense; that is to say, that, although available against persons generally, they are modified by a paramount right in certain persons. Such is the beneficial estate in land of which another person is seised (as trustee or otherwise) for an estate in fee. Such are the rights arising from the lawful possession of a thing in which another has a right of property.

Another class of rights of property in a modified sense are *jura in re*, including servitudes or easements and profits *à prendre* in the soil of another. Analogous to these are such rights as rights of way, etc., exercisable by the public generally, although these might be more correctly described as reservations by the Sovereign out of the property granted to, or permitted to be exercised by, the person having the fee-simple or other estate in the land. Amongst rights of property must also be included some other rights commonly referred to under the general name of *franchises*, a term comprising various classes of rights or *liberties*, supposed to have originated in some special grant by the King. Some of the rights included in the term "franchise" will be conveniently dealt with under the head of *Status*.

OBLIGATION.

Obligation is happily, and sufficiently, indicated by the description in the Institute of Justinian: "*Juris vinculum, quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.*" It is metaphorically the chain by which *certain persons* are linked together by legal rights and duties.

Obligations have been sometimes classed as arising *ex contractu* or *ex delicto*. Those arising *ex delicto* may again be

merely civil obligations, giving rise to an action by the person injured, or they may result in a criminal proceeding. That is to say, the obligation in the latter case is treated as being one owing to the Sovereign, and is prosecuted in the King's name.

It is not proposed in the present work to pursue an arrangement strictly on the lines of a philosophical division of the subject. The rules of English law do not fall readily and exactly into categories such as are above indicated.

The following arrangement of topics is chosen as one based upon established lines, and adapted to bear the test of modern analysis:—

PART I.—*Status*, including—

- (A) Public privileges and franchises.
- (B) Conditions (or *status*) arising out of certain important private relations; namely—
 - (a) Husband and wife.
 - (b) Parent and child.
 - (c) Guardian and ward.
 - (d) Master and servant.

PART II.—Ownership or property.

PART III.—Obligations (specially binding upon particular persons)—

- (A) By contract, or through a legal relation analogous to contract.
- (B) Arising otherwise than by reason of contract or analogous relation (and here treated primarily with regard to their civil consequences).

PART IV.—Civil procedure.

PART V.—Criminal law and procedure.

PART I.—*STATUS*.

(A) PUBLIC PRIVILEGES AND FRANCHISES.

CHAPTER IV.

OF THE KING (OR QUEEN REGNANT).

IN accordance with the general division of the subject above indicated, it will be convenient, before treating of the rights usually classed as *property*, to consider under the head of *Status* the privileges enjoyed according to English law by certain persons or classes of persons.

And first of the King (or Queen Regnant).

The rules of succession to the Crown are fixed by ancient usage and precedent, modified by the authority of Parliament in Acts of Settlement. The general rules established by precedent are (1) that the succession to the Crown is hereditary; (2) that it descends lineally to the issue of the last reigning King (or Queen); (3) that amongst children, males are preferred to females, and primogeniture takes place as well between daughters (if more than one) as between sons (if more than one); (4) that representation prevails, so that the issue of a deceased child, who, if living, would have inherited, succeed in the place of that child in preference to a brother or sister of that child; and (5) lastly, on failure of lineal descendants, the Crown goes to the next collateral relation (being of the blood royal) of the late King or Queen, and in collateral succession a collateral by the half-blood (being of the blood royal) has the same right of succession as if related by the whole blood (*a*).

(*a*) This rule, at first sight, appears to differ from the old common law rule of succession in land, where the stock of descent was the person last

Such are the general rules of succession by the common law. But it has been long well established that the rules of succession may be modified by the supreme authority of Parliament. There have been various enactments of this kind, either declaring or varying, according to the exigencies of the time, the rule of the common law. In every case Parliament has shown an anxiety to depart from the established order of succession no further than was conceived to be necessary for the common safety and welfare. Of these enactments, it is sufficient here to mention the two latest, namely, the Act of the first year of William and Mary (1 W. & M. sess. 2, c. 2), and the Act of Settlement of the year 1700 (12 & 13 Will. III. c. 2). The former of these Acts carried out the principles adopted by the Convention of Estates upon the Revolution of 1688—the principle, namely, of securing a Protestant succession, without departing further than for that purpose was necessary, from the rules of succession established by long usage. By this Act the Crown was settled upon the King and Queen (William and Mary) and the survivor of them, with remainder to the heirs of the body of the Queen (Mary), and for default of such issue to the Princess Anne of Denmark (afterwards Queen Anne) and the heirs of her body, and for default of such issue to the heirs of the body of the King (William III.). The Queen (Mary) having died without issue, and the only surviving issue of the Princess Anne of Denmark having died, so that there appeared a likelihood of a failure of all the limitations expressed in the Act of 1 Will. & Mary, the Act of Settlement of 1700 (12 & 13 Will. III. c. 2) was passed, by which it was enacted and declared that, after the King (William III.) and the Princess Anne of Denmark, and in default of issue of the said Princess Anne and of the King (William III.) respectively, the Princess Sophia, Electress of Hanover, daughter of the Princess Elizabeth, daughter of the late King James I., was to be the next in

seised, and collateral succession by the half-blood was excluded. That rule was obviously the product of some notion connected with tenure, and could not possibly be applied to the paramount title of the King.

C.

D

succession in the Protestant line, and the Crown should devolve accordingly upon the said Princess Sophia and the heirs of her body, being Protestants. Under this Act, upon the death of Queen Anne (in 1714), the Crown devolved upon George I., the son and heir of the body to the Princess Sophia (then deceased). And although at one time (a) a failure of issue of the Princess Sophia seemed to be imminent, such an event has receded to an indefinite distance, owing to the birth, happy marriage, and numerous issue of the late Queen Victoria.

The maxim that "the King can do no wrong" means that the King is not liable to any legal proceedings for any wrong supposed to be done by him. And no action will lie against a servant of the Crown in respect of a duty alleged to lie upon him as such servant (*Reg. v. Lords of the Treasury* (1872), L. R. 7 Q. B. 386; 41 L. J. Q. B. 178; 1 R. C. p. 802).

The practical consequences of the maxim are the following :—

1. The personal exemption of the King from being called upon to answer or defend himself in any proceedings in a Court of Justice.

2. The personal responsibility of the servants of the Crown for any wrongful acts committed under colour of the King's commands.

3. In certain cases a remedy is allowed to the subject by a *quasi* legal proceeding called a "petition of right." This is allowed where a claim is made under a contract with the King, or his servants acting in an official capacity; or to obtain restitution of property taken possession of in the King's name by the servants of the Crown acting with some *primâ facie* justification. The remedy by petition of right does not apply to cases where a wrong, not being merely breach of contract, or done in exercise of a *primâ facie* right, has been committed under colour of the King's authority. For such an act the wrong-doer is responsible

(a) On the death (in 1818) of the Princess Charlotte, daughter of the Prince of Wales, afterwards George IV.

in an ordinary action, and has no claim to any relief against the King. The procedure under a petition of right is now regulated by the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34).

Immunity from legal proceedings is extended by the English Courts to the acts of the Sovereign in a foreign independent state. And property belonging to a foreign Sovereign as such cannot be attached by any process of law in this country. The ambassador also of a foreign Sovereign and his servants, registered pursuant to the Diplomatic Privileges Act, 1708 (7 Ann. 12), are exempt from process in any civil action.

It is a rule well established by the common law that a servant of the Crown (other than a judge holding office by statute during good behaviour) holds office only during the Royal pleasure; and this notwithstanding anything to the contrary expressed in the terms of the appointment upon which he accepted office. And consequently no claim, by petition of right or otherwise, is competent to any such servant on the ground of dismissal.

Other prerogatives of the Crown will be more conveniently explained in relation to private rights of property upon which they take effect as exceptions or restrictions. Of these it may be sufficient here to mention the law of Escheat, entitling the Crown to land upon a failure of heirs; the right of the Crown as, *ultimus hæres*, to the chattels of an intestate dying without next of kin; the principle of common law (now restricted by statute) that prescription or limitation does not run against the Crown; the priority of the Crown as a creditor over other creditors; the presumption that a statute is not intended to bind the Crown unless such intention appears on the face of the Act; and the presumption that a Crown grant is not intended to operate against the Crown beyond its precise words.

CHAPTER V.

OF THE ROYAL FAMILY.

A QUEEN CONSORT, the wife of the King, is his subject; but by the statute 25 Edw. III. it is equally treason to compass or imagine the death of our lady the King's companion, as of the King himself, and to violate or defile the Queen Consort is high treason as well in the person committing the fact as in the Queen herself if consenting.

In England there have been certain privileges attached by the common law to the Queen Consort. These consisted mostly of exceptions to the disabilities at common law of married women generally. As most of these disabilities have been practically abolished by the Married Women's Property Acts of 1870 and 1882 (*a*), which adopted and extended certain principles already established in Courts of Equity, it is now unnecessary to enumerate them. It may be mentioned, however, that the Queen Consort has her own officers as well in matters of law as of ceremony; and her Attorney and Solicitor Generals are entitled, in the King's Courts, to take a place within the bar along with the King's Counsel.

The husband of a Queen Regnant is her subject, and may be guilty of high treason against her; but in his case conjugal infidelity is not treason against her for the reason that the true succession to the Crown is not thereby endangered.

A Queen Dowager, widow of the King, enjoys most of the privileges of a Queen Consort. But she is not affected by the clause of the statute of treason which applies to the Queen Consort. She may, although married again (which must be by the King's license), maintain an action in her own name as Queen of England.

The heir-apparent to the Crown, and also his Royal Consort, and the Princess Royal, or eldest daughter of

(*a*) 33 & 34 Vict. 93, and 45 & 46 Vict. c. 75.

the King, are likewise affected by the statute 25 Edw. III. The heir-apparent to the Crown is usually made Prince of Wales and Earl of Chester by special creation and investiture by letters patent; but, being the King's eldest son, he is by inheritance Duke of Cornwall without any new creation.

In the reign of George I. it was resolved by a majority of the judges that the education and care of all the King's grandchildren, while minors, did of right belong to the King even during the lifetime of the father of the minors; and it was agreed by all the judges that the care and approbation of the marriages of the grandchildren belonged to the King, their grandfather. By the Royal Marriages Act, 1772 (12 Geo. III. c. 11), no descendant of the body of King George II. (other than the issue of princesses married into foreign families) can marry without the previous consent of the Crown: provided that such of those descendants as are above the age of 25 may, after a twelve months' notice given to the King's Privy Council, contract and solemnise marriage without the consent of the Crown, unless both Houses of Parliament shall, before the expiration of the twelve months, expressly declare their disapprobation of such intended marriage.

CHAPTER VI.

OF TITLES OF DIGNITY.

MENTION has been already made (p. 4, *ante*) of the "Lords Temporal" as collectively forming an element of the Imperial Parliament. They are of various degrees in point of precedence; but all derive their titles from creation (actual or presumed) of the King. The title of Duke, which is the highest, though by no means the oldest, was first conferred upon a subject by Edward III., who created his eldest son, Edward the Black Prince, Duke of Cornwall. The next in order of dignity is the title of Marquis, whose office, formerly, was to guard the marches, or limits of the kingdom. The next, and the most ancient, that of Earl

(or *comes*, i.e. president of a county), is one whose origin is not easily traceable. The next, that of Viscount, or *vice-comes*, a term which in ancient Latin documents was applied to the sheriff, was employed as a mere title of honour in the creation, by Henry VI., of John Beaumont to be a peer by the title of Viscount Beaumont. The lowest title of dignity in the peerage is that of Baron, a term which in the twelfth century meant a tenant-in-chief of the Crown, but is now confined to the greater barons who (or whose ancestors) have been summoned to Parliament as Peers, or have been created by letters patent.

The privilege of being tried by his Peers, accorded by Magna Charta, c. 29, belongs alike to all persons holding these titles of dignity, and for that purpose they are all regarded equally as Peers. The last application of this privilege took place on a trial for bigamy in 1901 (*a*).

A similar right is accorded or confirmed in favour of Peeresses, whether in their own right or by marriage, by statute 20 Hen. VI. c. 9. A peeress in her own right remains a peeress, although married to a commoner; but according to the strict rule of privilege, although the title may be allowed as a matter of courtesy (*b*), a lady who is merely ennobled by marriage loses that dignity by a second marriage with a commoner.

A peerage once granted by the King cannot be surrendered (*Earldom of Norfolk Peerage Claim*, 1907, A. C. 10).

CHAPTER VII.

OF INFERIOR EXECUTIVE OFFICERS.

REFERENCE has already been made to the responsible Ministers of the Crown, under whose advice all acts in the name of the Sovereign are presumed to be done. No limitation can be assigned to their powers except the

(*a*) 1901, A. C. 446; 70 L. J. M. C. 998.

(*b*) See *Cowley v. Cowley* (H. L.), 1901, A. C. 450; 70 L. J. P. D. & A. 83; particularly the speech of Lord MACNAGHTEN.

general statement that they must be exercised according to the constitution. Of the executive officers whose sphere of action is strictly limited by law, the most ancient are the Sheriffs and Crowners (or Coroners). The office of the Sheriff is a very ancient one. Under Norman usages, he came to be regarded as the deputy of the Earl, or *comes*, and as such charged with the King's business within the county. He was, accordingly, in Latin documents of the period, styled *vice-comes*. The sheriffs are now chosen yearly, by appointment made by the Crown, out of a list of three for each county nominated by the Lord Chancellor and other high officers of state and the judges of the High Court meeting at the Royal Courts of Justice on November 12, or, if that day is a Sunday, on the day following (The Sheriffs Act, 1887, 50 & 51 Vict. c. 55, s. 6). The office continues during the pleasure of the Crown, but is not determined by a demise of the Crown. The sheriff is charged with the keeping of the peace in his county, and for that purpose is bound, if necessary, to summon the *posse comitatus*, or power of the county, to aid him. He is also charged with the service of writs and the execution of the judgment in civil actions. In criminal matters he is responsible for the custody of the accused and the carrying out of the sentence of the Court, although it extend to death. In both civil and criminal matters he has to summon and return the jury. In all these matters he usually acts by an under-sheriff or deputy, under whom, again, there are inferior officers, such as bailiffs, gaolers, etc.

The judicial functions of the sheriff, which in Scotland have remained important, were in England restricted by Magna Charta, which forbids sheriffs to hold pleas of the Crown; and in practice they became restricted to the recovery of small debts. Now these functions are practically in abeyance, and the jurisdiction is exercised by the County Courts constituted under various modern statutes. The sheriff is now bound to hold a County Court only for the purpose of an election, or in accordance with some writ specially directed to him (50 & 51 Vict. c. 55, s. 18).

The office of the Crowner, or Coroner, is a very ancient one, and was originally one of popular election by the freeholders of the county. The coroner appears to have formerly exercised an extensive jurisdiction, but by Magna Charta he was, like the sheriff, forbidden to hold pleas of the Crown. His principal duty at the present day is confined to inquiries into the cause of death, where there is reasonable ground of suspicion of violence, or in cases of sudden death where the cause is unknown, or of death in prison. The inquiry is by a jury summoned for the purpose, on view of the body. In case of a verdict of murder or manslaughter being found, the coroner has the further duty of issuing the warrant for arresting the accused; and in the case of manslaughter he has the discretion of accepting bail for the appearance of the accused at the trial. By the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 5), the coroner for a county is appointed by the County Council. This has been held not to apply to the appointment of what have been called "franchise coroners," where the appointment, before the Act of 1888, was made by the lord of the franchise, or otherwise than by the freeholders: *Ex parte London County Council*, 1892, 1 Q. B. 33. Boroughs having a separate Court of Quarter Sessions appoint borough coroners: Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 171).

Justices of the peace are appointed by commission from the King as conservator of the peace throughout his dominions, and under powers regulated by numerous Acts of Parliament, commencing with the statute 4 Edw. III. c. 5. The commission empowers each of the justices to take measures for preserving the peace in his county, and empowers any two or more to hear and determine all felonies and other offences. The duties heaped upon these justices by statutes are very numerous. And by various statutes, the effect of which is embodied in the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), they are protected from vexatious actions. Any action brought against a justice of the peace for anything done by him in the

execution of his office must be brought within six months from the time of the act complained of, and only after giving a month's notice. Further provision is made for the tender of amends which the plaintiff in the action must accept on peril of losing the costs of the action if the amends so tendered shall be found sufficient.

CHAPTER VIII.

OF NATURAL-BORN BRITISH SUBJECTS, PERSONS NATURALISED, AND ALIENS.

AN important division of persons relates to their *status* as subjects of the King, or aliens.

Primarily, persons are distinguished as natural-born British subjects (persons born within the dominion of the King), and all others, who are presumptively aliens.

The *status* of natural-born British subjects has been conferred by statute (7 Anne, c. 5; 4 Geo. II. c. 21; and 13 Geo. III. c. 21) upon the children and grandchildren born abroad, of natural-born British subjects. It has been decided that the *status* conferred by these Acts does not extend to the children and grandchildren of the persons so constructively made natural-born subjects (*De Geer v. Stone*, 1882, 22 Ch. D. 243; 52 L. J. Ch. 57).

By the common law, the duty of allegiance belonging to the *status* of a natural-born subject is permanent, and cannot be discharged, according to the maxim, "*Nemo potest exuere patriam*." But by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), means are provided whereby a person may divest himself of, as well as acquire, the *status* of a British subject. By sect. 6 of this Act, it is enacted that a British subject, who has at any time before, or may at any time after the passing of the Act, when in a foreign state and not under any disability, voluntarily become naturalised in such state, shall thereupon be deemed to have ceased to be a British subject, and be regarded as an alien.

The effect of this provision was much considered in the case of *Rex v. Lynch* (1903, 1 K. B. 444; 72 L. J. K. B. 167)—a trial at bar for treason before the Lord Chief Justice (Lord ALVERSTONE), Mr. Justice WILLS, and Mr. Justice CHANNELL. It appeared that the accused, previously to, and as the means of, obtaining naturalisation as a subject of the Transvaal Government, had formally declared his willingness to serve in the war then (A.D. 1900) being carried on against the Queen. On the evidence given for the Crown it appeared (*primâ facie*) that the proceedings for naturalisation were initiated and carried through with the intention of aiding the enemies of the Queen. Before launching the case for the defence, it was argued that on obtaining the letter of naturalisation for the Transvaal the accused had (under sect. 6 of the Act) ceased to be a British subject, and that the previous declaration, being only part of the *res gestæ* of the naturalisation, could not be regarded separately as an overt act of treason. But the Court unanimously held (1) that the declaration was itself *primâ facie* an overt act of treason, and (2) that, assuming the intention of the whole proceeding to have been to aid the Queen's enemies, it was not the intention of the Act that such a naturalisation should absolve the subject from his allegiance to the Queen. The evidence for the defence was chiefly directed to show that the object of the accused in coming to South Africa was merely to act as a war correspondent. Upon the whole evidence it was urged on the part of the Crown that the intention of aiding the Queen's enemies was completed previously to the act of naturalisation. The jury took this view and found the prisoner guilty upon all the counts of the indictment, and he was sentenced to death accordingly. The sentence was, by the exercise of the Crown's prerogative, commuted to penal servitude.

Before the Act of 1870, the civil disabilities of aliens, especially in regard to the holding of real property within the United Kingdom, were considerable. Under the Act of 1870 an alien may acquire title to and hold real and personal property of every description; but this does not confer

any right on an alien to hold real property situate out of the United Kingdom. Presumably, in the case of real property in other parts of the British dominions, it is left to the legislative authority in the colony or dependency to make any change in the law which they may think necessary. The Act does not qualify an alien to be the owner of a British ship (sect. 13).

An alien enemy is incapable of maintaining an action in our Courts; nor can an action be maintained on his behalf. The criterion appears to be residence in the hostile country, so that a British subject who is resident and carrying on trade in the enemy's country is incapable of suing here, while a subject of the enemy's country residing here under the King's protection appears to be under no such disability (*per* ROOKE, J., in *McConnell v. Hector* (1802), 3 Bos. & P. 113). A British subject domiciled in a neutral country may exercise the rights of a citizen of that country by trading with a country which is at war with us (*Bell v. Reid* (1813), 1 M. & S. 726). The right of action under a contract lawfully made during peace is only suspended during the war.

It is illegal without the license of the King to trade with the enemy's country; and where, after the making of a contract in the course of a lawful trade, war breaks out so as to make that trade illegal, the contract is rescinded, and cannot afterwards be made binding, by reason of an offer of the Government to grant a license (*Esposito v. Bowden*, Ex. Ch. 1857, 7 Ell. & Bl. 763; 27 L. J. Q. B. 17).

By the Aliens Act, 1905 (5 Edw. VII. c. 13), restrictions were enacted as to the landing at ports of the United Kingdom of aliens who come within the description of "undesirable immigrants" within the 1st section of the Act. And in the 2nd section provision is made for orders to be made for the expulsion, as "undesirable aliens," of persons coming under the description in that section.

CHAPTER IX.

OF ECCLESIASTICAL PERSONS.

ALTHOUGH the *status* of ecclesiastical persons occupies in this country a less important place than was formerly the case, the Church, as by law established, in England, as well as that established on a very different model in Scotland, still occupies an important place in our legal system.

Archbishops and Bishops, including those who, in right of the more ancient dioceses, sit in the House of Lords by the name of "Lords Spiritual," constitute the first order. They are elected by the Chapter, after being nominated by the Crown.

The next in order of dignity to the Bishops are the Deans, who (with the Chapters, consisting of Canons or Prebendaries, over whom they respectively preside) are mainly concerned with the maintenance of the fabric and services of their cathedrals. The Deans of Westminster and Windsor are independent of any bishop. The nomination, and in some cases the appointment, of Deans is in the Crown.

Next in order are Arch-Deacons, who are usually appointed by the Bishop. Rural Deans are chiefly concerned with inquiries relating to dilapidations of the parsonages and vicarages in their districts.

The last in order of the established clergy are the Parsons (or Rectors) who are entitled to the whole ecclesiastical dues of their parishes, and the Vicars, who only receive part of these emoluments, the rest being in the hands of a Lay Rector. There are also Curates, who are persons in holy orders employed under the Parson or Vicar. And some curacies are called perpetual, having a more permanent *status* under some special arrangement or endowment.

Churchwardens are officers usually elected at the annual vestry or parish meeting, and have duties relating to the guardianship of the church. Formerly they exercised various functions of a secular character: but by the Local Government Act, 1894 (56 & 57 Vict. c. 73) all their powers

and duties, except so far as they relate to the affairs of the Church or to charities, and except some of their powers and duties as overseers, are transferred to the parish councils instituted under that Act.

CHAPTER X.

OF THE NAVY AND ARMY.

OF the regular forces available for war, the Navy, as the older service, as well as the first and only secure line of defence against any probable combination of enemies, ought to be first considered.

The Navy is a service organised on a permanent footing under long usage and various Acts of Parliament, of which the most important now are the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109); the Naval Discipline Act, 1884 (47 & 48 Vict. c. 39); and the Naval Enlistment Acts, 1835 to 1884 (5 & 6 Will. IV. c. 24; 16 & 17 Vict. c. 69; and 47 & 48 Vict. c. 46).

On emergencies the Government always had the power, by Royal Proclamation and Commission, to impress seamen for service in the King's ships. The proclamations and commissions for this purpose form a series extending from a very ancient date, and the legality of the practice is confirmed by decisions of the King's Bench (*R. v. Jubbs*, Cowp. 517; *Ex parte Fox* (1793), 5 T. R. 276). It has been said that the only excepted case which does not rest on statute is that of a ferryman (*per* BULLER, J., in *Ex parte Fox*, 5 T. R. 277).

By an Act in 1740 (13 Geo. II. c. 17), to encourage persons to serve in British merchant ships, an exemption from being impressed was made in favour of apprentices under certain circumstances, and of persons of the age of fifty-five years and upwards.

By the Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), a scheme was set on foot for a Naval Reserve, whereby the *personnel* of the Navy might be temporarily augmented

in time of need. And by sects. 195-197 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), seamen are enabled to volunteer into the Navy without forfeiture of the wages they have earned in the merchant service.

The general liability of seamen to impressment, however, remains unaltered by any statute, and could still undoubtedly be enforced. But, having regard to the altered conditions of the service, where the seamen of the King's Navy have, as a rule, been trained in that service from boyhood, it seems not very probable that an indiscriminate use of the power of impressment will be exercised in the future.

By the Naval Artillery Volunteers Act, 1873 (36 & 37 Vict. c. 77), a volunteer force of naval artillery was organised; and by the National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 3, provision is made for their being called out whenever an Order is in force for calling out the Naval Reserve under the Naval Volunteers Act, 1853.

The Army is constituted on a different principle, under statutes which, unless renewed by an annual Act of Parliament, would expire within a limited time. Formerly it was the practice to enact expressly the whole of the provisions relating to the enlistment for and discipline of the Army in an annual Act, commonly called the Mutiny Act. Now the practice is to pass an annual Act renewing the provisions of the Army Act, 1881 (44 & 45 Vict. c. 58), with such amendments as, from time to time, are found suitable. Without such renewal there would be no legally binding obligation for maintaining the cohesion and discipline of the service.

Besides the regular Army there are various auxiliary forces available for defence.

The Militia are organised as a defensive force on the principle that none can be called on without his consent to serve out of the United Kingdom. The Acts relating to the Militia, of which the most important now in force is the Militia Act, 1882 (45 & 46 Vict. c. 49), do not require renewal in the same way as the Army Act. Formerly the Militia were organised on the principle of compulsory service

by ballot, if there were an insufficient number of volunteers ; but by an Act in 1865 (28 Vict. c. 46), hitherto continued by Expiring Laws Continuance Acts, this system has been suspended.

The Yeomanry consist of volunteer corps in the different counties constituted under Acts which were consolidated by the Yeomanry Act, 1804 (44 Geo. III. c. 54). By the National Defence Act, 1888 (51 & 52 Vict. c. 31), the Yeomanry may, when an order for the embodiment of the Militia is in force, be called out for actual military service in any part of Great Britain.

The existing corps of rifle volunteers were set on foot by Royal Warrants, issued under an Order in Council in the year 1859. They have since been regulated by various statutes, particularly by the Volunteer Act, 1863 (26 & 27 Vict. c. 65).

All the auxiliary forces and reserves are further regulated under the Regulation of the Forces Act, 1881 (44 & 45 Vict. c. 57), and the Reserve Forces Acts, 1882 to 1906, referred to in the last of these Acts (6 Edw. VII. c. 11, s. 3).

CHAPTER XI.

OF CORPORATIONS.

A CORPORATION is a fictitious person created by intendment of law consisting of one or more individuals, with a perpetual succession, so that the legal person may endure for an indefinite time. Corporations had their origin in the Roman law, under which they were called *universitates*, or *collegia*. Under that law the maxim "*tres faciunt collegium*" was the rule. But a corporation, originally consisting of three or more persons, still subsisted as a corporation, though reduced to one. English law admits of a corporation sole, consisting of one person. Such is the King ; and such are bishops, parsons, or vicars ; so that, for instance, the freehold of the parsonage house glebe and tithe rent-charge is vested in the parson as such, and on the death of an incumbent becomes vested in his successor without any conveyance.

To the erection of a new corporation, an Act of Parliament or Royal Charter is necessary. All existing corporations (other than the King) owe their origin actually or presumably to one of these modes of creation, although there are many corporations which have existed from time immemorial without any charter or Act of erection being extant. Such are called corporations by prescription, of which some of the City Companies in London are examples. No express words are necessary to create a corporation. It is sufficient if duties of a permanent nature are imposed upon the persons indicated and their successors, and a rule of succession clearly laid down. *Tone Conservators v. Ash* (1829), 10 B. & C. 349 (7 R. C. 239). To explain an ancient charter, where the meaning is obscure, evidence of usage is admissible. *Tewkesbury (Bailiffs of) v. Bricknell* (1809), 2 Taunt. 120.

At common law the acts of the corporation are those of a duly constituted meeting to which (unless there is a fixed time of meeting) all the corporators must be summoned, and, if the corporation consists of a definite number, the major part must attend. To create a binding obligation on the corporation, there must be an instrument in writing sealed and delivered at a duly constituted meeting according to a resolution of the majority present at the meeting. These rules, of course, give way to special provisions in the instrument creating the corporation, or in a general Act of Parliament relating to a particular class of corporations. For instance, in the Municipal Corporations Act, 1882, consolidating the provisions of former Acts, special regulations are by sect. 22 laid down as to the meetings of the council.

The Acts relating to municipal corporations enacted at various dates from 1835 onward, and consolidated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), contained various provisions modifying the constitution of existing boroughs, and laying down the conditions to which the constitution of any new boroughs shall conform. The power of the Crown to create new boroughs is expressly recognised by sect. 216 of the Consolidating Act, which is as follows:—

“216.—(1) A charter creating a municipal borough which purports to be granted in pursuance of the Royal prerogative and in pursuance of or in accordance with this Act, shall after acceptance be deemed to be valid and within the powers of this Act and Her Majesty’s prerogative, and shall not be questioned in any legal proceeding whatever.

“(2) Every such charter shall be laid before both Houses of Parliament within one month after it is granted, if Parliament is then sitting, or if not, within one month after the beginning of the then next sitting of Parliament.”

The effect of the common-law powers compared with the provisions of the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76) and 1 Vict. c. 78, s. 49, were much considered in the case of *Rutter v. Chapman* (Ex. Ch. 1841), 8 M. & W. 1 (7 R. C. 179). In effect the charter is not invalidated by reason of its containing machinery for constituting the new borough for which there are no adequate provisions in the general Acts.

County Councils are a comparatively new species of corporations created under the Local Government Act, 1888 (51 & 52 Vict. c. 41). By sect. 69 of that Act the County Council is a body corporate by that name with the addition of the name of the administrative county. The County Council succeeds to the administrative business previously done by the justices of the county in quarter sessions, and to the property and liabilities held or incurred by quarter sessions or the clerk of the peace or any justices or justice of the peace or commissioners or otherwise for county purposes.

The parish council, constituted under the Local Government Act, 1894 (56 & 57 Vict. c. 73), is, by sect. 3 (9) of the Act, a corporation by the name of parish council with the addition of the name of the parish. The parish council succeeds to most of the duties and liabilities of the vestry and churchwardens, except so far as relates to the affairs of the Church or to ecclesiastical charities (sect. 6). The district council of a rural district under the same Act is also, sect. 24 (7), a corporation.

Of corporations constituted under Acts of Parliament

C.

E

there are important groups consisting of companies constituted under special Acts for various public purposes. These special Acts usually incorporate the provisions of certain general Acts, such as the Companies Clauses Acts, 1845 to 1889; the Lands Clauses Consolidation Act, 1845; and the Railways Clauses Consolidation Act, 1845; or it may be (*inter alia*) the Waterworks Clauses Act, 1847, or Acts of a similar character. The general Acts here mentioned contain *fasciculæ* of clauses which at one time were set out at length in the special Act, but in special Acts passed since the date of the General Act in question, are incorporated into the special Act by reference.

Corporations of this class enjoy, in consideration (it may be presumed) of the public benefit to be afforded by them, certain immunities in the exercise of their statutory powers. It is settled law that an action will not lie for damage necessarily resulting from the exercise of the powers of an Act of Parliament in a case for which no provisions as to compensation is made by the Act. In such cases the corporation are bound, in the exercise of their powers, to take reasonable precautions; but, having done so, are no further responsible. The principle is illustrated by such cases as *Vaughan v. Taff Vale Railway Co.* (Ex. Ch. from Exch. 1860), 5 Hurl. & N. 679; 29 L. J. Ex. 247 (1 R. C. 297); *Hammersmith Railway Co. v. Brand* (H. L. 1869), L. R. 4 H. L. 171 (1 R. C. 623); *Blyth v. Birmingham Waterworks Commissioners* (1856), 25 L. J. Ex. 212; *Fremantle v. London & North Western Railway Co.* (1861), 31 L. J. C. P. 12. On the other hand, cases where the corporation have been held liable through neglect, or through non-use of their statutory powers which might have averted the damage, are *Smith v. London & South Western Railway Co.* (Ex. Ch. from C. P. 1870), L. R. 6 C. P. 14; 40 L. J. C. P. 21; *Geddis v. Proprietors of Bann Reservoir* (H. L. appeal from Ireland, 1878), 3 App. Cas. 430.

Another consequence of the public purposes for which these corporations exist, is that creditors or persons holding securities over the property of the corporation cannot get

execution against the property in a manner which will necessarily prevent the public purposes being carried out. Thus the holder of debentures creating a charge on the undertaking of a company formed for public purposes, is not entitled to a sale of the property comprised in the charge: *Gardner v. London, Chatham & Dover Railway Co.* (1867), L. R. 2 Ch. 201; 36 L. J. Ch. 323 (7 R. C. 409); *Blaker v. Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399; 58 L. J. Ch. 497 (7 R. C. 428). The Court has, however, under the Companies Act, 1862 (sect. 199) jurisdiction to make an order for winding up a company (not being a railway company) although incorporated by statute for a public purpose: *In re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585; 58 L. J. Ch. 613 (7 R. C. 435); *Re Proprietors of Basingstoke Canal* (1866), 14 W. R. 956.

The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), passed subsequently to the decision of *Gardner v. London, Chatham & Dover Railway Co.*, contains (sects. 4 and 23) express provisions as to the remedies of the execution creditor and debenture holders of a railway company. The remedy of the execution creditor is by the appointment of a receiver, and, if necessary, of a manager; and the priority of debenture holders is expressly protected.

Where a company, incorporated by Act of Parliament, neglects to do works directed by the Act, they may be compelled by *mandamus* to do the works: *R. v. Severn & Wye Railway Co.* (1819), 2 B. & Ald. 646 (7 R. C. 445); *R. v. Bristol Dock Co.* (1842), 2 Q. B. 64 (7 R. C. 449). But for such a remedy there must be an express obligation in the statute, or else (perhaps) something in the nature of a public nuisance created by the company by the incomplete exercise of their powers: *York & North Midland Railway Co. v. Reg.* (Ex. Ch. 1853), 1 Ell. & Bl. 858; 22 L. J. Q. B. 225; *Parnaby v. Lancaster Canal Co.* (Ex. Ch. 1838), 11 Ad. & El. 223; 7 L. J. Q. B. 258. The distinction is clearly explained by the lucid judgment of BOWEN, L.J., in the case of *R. v. Great Western Railway Co.* (C. A. 1893), 62 L. J. Q. B. 572 at p. 580. And see *Darlaston Local Board v. London & North*

Western Railway Co. (C. A.), 1894, 2 Q. B. 694; 63 L. J. Q. B. 826.

A corporation formed for public purposes is, if it exceeds its powers, and if the misfeasance concerns the public, liable to an indictment; and may, at the instance of a private person concerned, be restrained by injunction: *R. v. Great North of England Railway Co.* (1846), 9 Q. B. 315 (7 R. C. 466); *Pugh v. Golden Valley Railway Co.* (C. A. 1880), 15 Ch. D. 330; 40 L. J. Ch. 721 (7 R. C. 474).

Another important group of corporations comprises those constituted for trading purposes under the Companies Acts, 1862 to 1900. These Acts, and the numerous cases which have been decided relating to the companies formed under them, make in themselves a *Corpus Juris* of which it is beyond the scope of this work to attempt a sketch. It is enough here to refer to the exhaustive treatise of Lord Justice BUCKLEY on Company Law, and to the second volume of the more recent editions of Lord LINDLEY's book on Partnership.

Other statutes in which certain associated persons are expressly declared to be bodies corporate are building societies registered under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and Industrial and Provident Societies registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39). By sect. 21 of the latter Act, the registration of the society renders it a body corporate by the name given in the certificate of registry, by which it may sue and be sued, with perpetual succession and a common seal; and vests in the society all property for the time being vested in any person in trust for the society.

The *status* of a trade union under the Trade Union Act, 1871 (34 & 35 Vict. c. 31), was the subject of a notable decision of the House of Lords in the case of *The Taff Vale, etc., Co. v. Amalgamated Society of Railway Servants*. The trade union in question was registered under the Act of 1871, which, by sect. 8, enacts that all real and personal estate belonging to any trade union registered under the Act, shall be vested in the trustees for the time being of the trade union, for the use and benefit of the trade union

and the members thereof; and (by sect. 9) that the trustees of the trade union registered under the Act, or other officer authorised by the rules of the trade union, may bring and defend any action concerning the property. The Act contains no express enactment creating the trade union a corporate body, or making them liable to sue and be sued in their registered name. By the decision of Mr. Justice FARWELL in the Taff Vale case, affirmed by the House of Lords (1901, Appeal Cases, 426), reversing the decision of the Court of Appeal, the defendants were held liable in an action (for damages and an injunction) brought against the trade union in their registered name. Now, by the Trade Disputes Act, 1906 (6 Edw. VII. c. 47, s. 4), "an action against a trade union, whether of workmen or masters, or against any member or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." There is a proviso saving the liability of the trustees of the trade union, in an action in respect of property under sect. 9 of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), not brought in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

The legal *status* of societies under the Friendly Societies Acts, 1875 to 1895, does not appear to have been the subject of any controversy in the Courts; but as far as relates to the holding of property, the trustees of the society sufficiently represent them: the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60).

A corporation, although by the intendment of its constitution, capable of enduring for an indefinite period, may be dissolved and come to an end in various ways, namely, (1) by an Act of Parliament; (2) in the case of a corporation consisting of an aggregate of certain individuals, by the death of all its members; (3) in the case of a corporation by charter, by surrender of its franchises into the hands of the King; (4) by forfeiture of its charter through

neglect or abuse of its franchises, which may be declared by the judgment upon an information in nature of a writ of *quo warranto*, to inquire by what warrant the corporate powers are pretended to be executed, and in effect to declare a forfeiture by reason of the neglect or abuse charged; and (5) in the case of corporations constituted by special Acts (except railway companies), as well as in the case of companies under the Companies Acts, by a winding-up order under the Companies Act, 1862, ss. 79, 199. As to railway companies where a warrant for the abandonment of the whole of the railway company has been granted, a winding-up may follow under the provisions of the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114, s. 4). Under sect. 199 of the Companies Act, 1862, provision is also made for the winding-up of other companies called unregistered companies. But these are, generally speaking, not strictly corporations.

“The Public Trustee,” whose office is established by the Public Trustee Act, 1906 (6 Edw. VII. c. 53), is a corporation sole under that name.

(B.) CONDITIONS (OR STATUS) ARISING FROM PRIVATE RELATIONS.

HAVING treated of various conditions (or *status*) of a public character, it is convenient next to consider those classes of rights arising from private relations which have been usually treated as belonging to the *status* or condition of the persons so related. Of these the most important are—Husband and Wife, Parent and Child, Guardian and Ward, and Master and Servant.

CHAPTER XII.

HUSBAND AND WIFE.

THE essentials of marriage, as understood in all Christian countries, are tersely expressed by the definition in Justinian's

Institutes of the Roman Law: “Viri et mulieris conjunctio, individuum vitæ consuetudinem continens.” It is “the voluntary union for life of one man and one woman to the exclusion of all others.” *Per* Lord PENZANCE in *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 133. The consent of the persons is of the essence of its inception, but once contracted, a *status* is constituted the incidents of which are fixed by law.

It follows, of course, from this definition that, if the man or woman purporting to contract a marriage is already married to a woman or man who is alive, and if such previous marriage has not been legally dissolved, the new marriage so purported is *ipso facto* void.

LEGAL CAPACITY IN RELATION TO MARRIAGE.

The capacity of contracting a valid marriage (by a man and woman neither of whom is already married as above mentioned) depends on (1) the capacity of consent, (2) the absence of relationship within the prohibited degrees, and (3) the physical capacity of consummating the marriage.

(1) *Consent*.—The English law, following the canon law, has fixed the age of matrimonial consent at fourteen in the male, and twelve in the female. The attempt to celebrate a marriage between persons either of whom is below that age is now, however, in this country so rare that it is not surprising that doubts should exist upon the effect of such a proceeding, namely, (a) whether it is void without any sentence of the Court to declare it so, and (b) whether it may be validated by subsequent consent without a new ceremony.

Where either of the parties is a minor, *i.e.* above the age of matrimonial consent and under twenty-one, the consent of parents or guardians is required by the Marriage Act, 1823 (4 Geo. IV. c. 76, s. 16). This enactment appears to be merely directory, and the want of consent would not generally nullify the proclamation of banns. But, where dissent has been openly expressed by a parent or guardian at the

time of proclamation of banns, the publication of banns is void (4 Geo. IV. c. 76, s. 8).

Unsoundness of mind in one of the parties at the time when a marriage purports to be contracted is a ground on which the marriage may be declared null, either by the party himself (or herself) having recovered sanity, or by the guardian appointed by the Court at the instance of the next of kin. The nature of the evidence in a suit for nullity on this ground is fully considered by Lord PENZANCE in a suit *Hancock*, falsely called *Peaty*, v. *Peaty* (1867), L. R. 1 P. & D. 335; 36 L. J. P. M. & D. 57.

(2) *Prohibited Degrees*.—Formerly a marriage within the prohibited degrees, whether of consanguinity or affinity, was voidable and not void. But by the Marriage Act, 1835 (5 & 6 Will. IV. c. 54), all marriages celebrated after the passing of that Act between persons within the prohibited degrees of consanguinity or affinity were declared to be absolutely null and void. By the same Act marriages celebrated before the Act between persons within the prohibited degrees of affinity (as to which no suit for nullity was pending at the date of the Act) were declared not liable to be annulled. To remove doubts as to the *status* of persons domiciled in a part of the British possessions where the marriage of a man with his deceased wife's sister is legal, it is, by the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. VII. c. 30), declared that persons, each of whom were so domiciled at the time of such marriage, are to be deemed lawfully married.

(3) The physical incapacity of either of the parties to consummate the marriage may be made the ground of a suit, at the instance of the other party, for annulling the marriage. The cases show that the Court must be satisfied, before pronouncing a decree, (a) that the incapacity existed at the time of the marriage, and (b) that sufficient time and opportunity has been given to show that the defect is practically insuperable, and (c) that the application to the Court is made within a reasonable time after the fact has been definitely ascertained.

ESSENTIAL SOLEMNITIES OF MARRIAGE (ENGLAND).

Until the statute passed in 1753, commonly called Lord Hardwicke's Act (26 Geo. II. c. 33), it was in England left to the common law to determine what were the essential solemnities to constitute a valid marriage. And it is curious to find a wide divergence of authority as to what, by the common law of England, was necessary to constitute a valid marriage. There is, however, a great *consensus* of the most learned authorities, both in England and America, that the common law of England adopted the rule of the canon law as it existed before the Council of Trent; that the solemn interchange of consent with the intention *de præsenti* to enter into the married state was sufficient; and that the presence of a priest episcopally ordained, or other minister of religion, was not essential to the validity of the marriage. The question was elaborately debated and considered in the case of *Reg. v. Millis* (1834), 10 Cl. & Fin. 534, where the result of an indictment for bigamy depended upon the validity of a marriage celebrated in Ireland according to the rites of the Presbyterian Church, being a body not at that time recognised as having any legal *status* in relation to marriage. An equal division of opinion among the judges of the Queen's Bench in Ireland was followed by an equal division of opinion in the House of Lords; and the defendant was acquitted. The result was conclusive upon the point that by the English common law an indictment for bigamy cannot be supported by proof of a former marriage so celebrated in the manner alleged; but upon the question whether the consent solemnly interchanged *per verba de præsenti* was sufficient to constitute a marriage, it is generally admitted that the opinions of the learned Lords in favour of that opinion are the more weighty. They follow and adopt the opinion of that learned judge, Lord STOWELL, in the Scotch case of *Dalrymple v. Dalrymple* (1811), 2 Hagg. Const. 54, where he states the argument upon the law of Scotland in language equally applicable to

the English common law. After describing the principles of the canon law, which gave effect to the consent of two parties expressed in words of present mutual acceptance (*per verba de præsenti*), he says: "The canon law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire, or has been varied, I take it to be a safe conclusion, that, in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is, that it continues the same. Show the variation, and the Court must follow it; but if none is shown, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto unknown in the Christian world. It becomes of importance, therefore, to consider what is the ancient general law upon this subject, and on this point it is not necessary for me to restate, that by the ancient general law of Europe a contract *per verba de præsenti*, or a promise *per verba de futuro cum copulâ*, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which Council were never received as of authority in Scotland."

The question is not without practical interest, as there are probably still places in the British dominions, or even in some American states, whither the English common law may be presumed to have been carried, and where there is no statutory law to displace it. A case of this kind was *Lautour v. Teesdale* (1816), 8 Taunt. 830.

Although by the canon law, which (with or without further conditions) formed the basis of the English common law upon the subject, the consent of the parties *de præsenti* was the only essential to the validity of a marriage, there was always a distinction between a marriage celebrated *in facie ecclesiæ*, which was the regular and reputable form, and marriages not so celebrated, which were accounted to be irregular and clandestine. The question of *status* was

further complicated by the practice of the English Ecclesiastical Court, whereby a contract *de futuro* to enter into the married state, though not in itself constituting marriage, could be specifically enforced, and the parties compelled to marry *in facie ecclesiæ*. That practice was put an end to by sect. 13 of Lord Hardwicke's Act, confirmed by sect. 27 of the Marriage Act, 1823 (4 Geo. IV. c. 76).

About the middle of the eighteenth century the loose practice in regard to clandestine marriages, and particularly the means of investing the proceedings with a spurious solemnity by the aid of vagabond priests or persons in mock orders, had led to inconveniences and scandals which were widely felt. And in 1753 the Act, commonly called Lord Hardwicke's Act, was passed to suppress these practices and to define strictly what should be the essentials to the celebration of a valid marriage.

This Act (26 Geo. II. c. 33), the effect of which was confined to marriages celebrated in England, was entitled "An Act for the better prevention of clandestine marriages." It was enacted that all marriages, other than marriages celebrated under special license from the Archbishop of Canterbury (under the statute 25 Henry VIII. c. 21), should be celebrated in the parish church or appropriate public chapel, after due publication of the banns, or else by license from the proper ecclesiastical authority; and that marriages not so solemnised should be void. The Act did not extend to marriages of persons both of whom were Quakers, or persons professing the Jewish religion (sect. 18).

Lord Hardwicke's Act was repealed by the Marriage Act, 1823 (4 Geo. IV. c. 76), which adhered generally to the same lines, but relaxed in certain respects the conditions under which a marriage was declared to be null and void. By this Act the consent of a parent or guardian to the marriage of a minor, though required, as already explained, was omitted from the category of requirements essential to the validity of the ceremony. And the condition for avoidance of a marriage, solemnised elsewhere than in a church or authorised chapel, or without due

publication of banns or license, was qualified by the words "knowingly and wilfully" (sect. 22). The exception relating to marriages between Quakers, and between persons professing the Jewish religion, was still maintained (sect. 31). Marriages between Quakers and between persons professing the Jewish religion, celebrated according to their respective usages, were expressly recognised and confirmed by the Marriage Act, 1836 (6 & 7 Will. IV. c. 85, s. 2), subject only to the proviso that notice be given to the registrar and his certificate obtained according to that Act. The rules as to Quaker marriages are further extended by the Acts of 1856, 1860, and 1872 (19 & 20 Vict. c. 119, s. 61; 23 & 24 Vict. c. 18; and 35 & 36 Vict. c. 10).

The Church of England, as by law established, still enjoys the privilege that a marriage celebrated in the consecrated building, and performed by a duly qualified clergyman and according to the rites and ceremonies of the Church, is valid without further conditions. And, as above shown, a legally binding force has been conceded to the usage of Quakers and Jews. But no legal operation has been conceded to the religious services, as such, of other dissenting bodies, nor to the celebration by a priest or minister (Catholic or Protestant) who is not of the Church of England. Ample opportunity is, no doubt, given to every religious community to celebrate their marriages in their own way; but (with the exceptions already mentioned) the binding force of the ceremony in law depends on the presence of the registrar at the ceremony, and the declaration of the parties made according to the Marriage Act, 1836 (6 & 7 Will. IV. c. 85, c. 20).

By the same Act a marriage may be celebrated at the office of the registrar by a purely civil ceremony (sect. 21, *et seq.*).

It would be too long to state the requirements, chiefly directory, of the Acts comprising various circumstances under which marriages may be celebrated in England. These Acts are collectively known as the Marriage Acts,

1811 to 1886 (a), and consist of the several Acts noted below (b).

By the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), which consolidates the enactments contained in a number of earlier Acts, conditions are laid down under which a marriage solemnised in any foreign country or place between parties, of whom one at least is a British subject, shall be as valid in law as if the marriage had been solemnised in the United Kingdom with a due observation of all forms required by law. By the Marriage with Foreigners Act, 1906 (6 Edw. VII. c. 40), provisions are made for ascertaining that there is no impediment to the marriage according to the foreign law.

ESSENTIAL SOLEMNITIES (IRELAND).

The marriage laws of Ireland, which, like those of England, were based upon the canon law, remained for a longer time unaffected by any statute. The provision of Lord Hardwicke's Act, putting an end to suits for compelling celebration *in facie ecclesiæ* of a contract of marriage, whether *per verba de præsenti* or *per verba de futuro*, was extended to Ireland (in 1818) by the Act 58 Geo. III. c. 81. The anomalous situation disclosed by the case of *Reg. v. Millis* (1834), 10 Cl. & Fin. 534, led to the Marriage (Ireland) Act, 1844 (7 & 8 Vict. c. 81), to be further adverted to in the sequel.

- (a) Short title given by the Short Titles Act, 1896 (59 & 60 Vict. c. 14).
- (b) The Marriage Act, 1811 (51 Geo. III. c. 37).
 The Marriage Act, 1823 (4 Geo. IV. c. 76).
 The Marriage Act, 1824 (5 Geo. IV. c. 32).
 The Marriage Confirmation Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 18).
 The Marriage Act, 1835 (5 & 6 Will. IV. c. 54).
 The Marriage Act, 1836 (6 & 7 Will. IV. c. 85).
 The Births and Deaths Registration Act, 1837 (7 Will. IV. and 1 Vict. c. 22).
 The Marriage Act, 1840 (3 & 4 Vict. c. 72).
 The Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119).
 The Marriage (Society of Friends) Act, 1860 (23 & 24 Vict. c. 18).
 The Marriage Confirmation Act, 1860 (23 & 24 Vict. c. 24).
 The Marriage (Society of Friends) Act, 1872 (35 & 36 Vict. c. 10).
 The Greek Marriages Act, 1884 (47 & 48 Vict. c. 20).
 The Marriage Validity Act, 1886 (49 & 50 Vict. c. 3).
 The Marriage Act, 1886 (49 & 50 Vict. c. 14).

As to Marriages between Roman Catholics.—There has never been any doubt that a marriage celebrated in Ireland between persons who are both Roman Catholics is valid if performed according to the practice of the Roman Catholic Church. That practice has strictly followed the decrees of the Council of Trent, whereby the presence of a priest and (unless dispensed with by episcopal license) the due proclamation of banns were essential. Such a marriage was therefore essentially a marriage *in facie ecclesiæ*, and was undoubtedly valid by the common law. Further, the influence of the ecclesiastical authorities of the Roman Catholic Church has been always exerted to secure that marriages should be *in facie ecclesiæ*; and a marriage which was irregular or clandestine (in the technical sense) between Roman Catholics would have been almost a contradiction in terms. Partly for this reason and partly, no doubt, because any suggestion of imposing further conditions upon these marriages would have been strongly opposed by Catholic representatives in Parliament—when it was thought necessary, in consequence of the uncertainty of the law revealed by the case of *Reg. v. Millis*, to regulate by statute the law relating to marriages celebrated in Ireland—it was by the Marriage (Ireland) Act, 1844 (7 & 8 Vict. c. 81), enacted (sect. 3) that nothing in the Act contained “shall affect any marriages by any Roman Catholic priest which may now be lawfully celebrated.”

This proviso extended (in effect) only to marriages between persons both of whom were Roman Catholics. For, by an Act of the Parliament of Ireland, 19 Geo. II. c. 13 (1746), a marriage between a papist and a person being, or professing to be, a Protestant, or between two Protestants, if celebrated by a popish priest, is declared to be null. Such a celebration of marriage took place and was relied on in the pleadings of the *Yelverton case* (a); but the attempt to set up such celebration as itself constituting a valid marriage was abandoned at an early stage of the case.

(a) *Longworth v. Yelverton*, Court of Session, 3rd Series, vol. i. p. 461.

As to Marriages between Protestant Episcopalians.—These may be celebrated according to the forms of the Church, either (1) after proclamation of banns, or (2) by special or ordinary license, or (3) on production of the registrar's certificate, and in the church or chapel where banns have been proclaimed, or specified in the license or registrar's certificate (see 7 & 8 Vict. c. 81, s. 1; 33 & 34 Vict. c. 110, s. 32, *et seq.*; and 34 & 35 Vict. c. 49, ss. 26, 27).

As to Marriage between Quakers and between Jews.—The enactments relating to these marriages are contained in the Marriage (Ireland) Act, 1844 (7 & 8 Vict. c. 81), s. 12; an Act of 1856 (19 & 20 Vict. c. 119), s. 21; an Act of 1860 (23 & 24 Vict. c. 18); and an Act of 1872 (35 & 36 Vict. c. 10). The effect in Ireland is practically the same as in England.

As to Marriages between Presbyterians.—These may be celebrated according to the forms used by Presbyterians, either by the license of a Presbyterian minister or after publication of banns in a meeting-house certified according to the Marriage (Ireland) Act, 1844 (7 & 8 Vict. c. 81, s. 4, *et seq.*).

As to Mixed Marriages.—Marriages between persons only one of whom is a Roman Catholic, may, after a license procured as directed by sect. 25 of the Marriage Law (Ireland) Amendment Act, 1871 (34 & 35 Vict. c. 49), be lawfully solemnised by a Roman Catholic clergyman between such persons; and marriages between persons only one of whom is a Protestant Episcopalian, may, upon the proper license under sect. 26 of the same Act, be solemnised by a Protestant Episcopalian clergyman, and in such cases it is not necessary to obtain a certificate from the registrar (sect. 27 of same Act). Such marriages must be celebrated in a building set apart for divine services according to the rites of the church of the clergyman performing the ceremony, and with open doors, within the proper hours, and in the presence of two or more witnesses.

As to Marriage by Ceremony between Persons not within the above Provisions.—After the expiration of 21 days from

the date of a notice to the registrar given according to the Marriages (Ireland) Act, 1844 (7 & 8 Vict. c. 81, ss. 13, 16, 29), or 7 days if the marriage is by license, marriages may be celebrated in the registered building stated in the notice according to any form and ceremony which the parties may see fit to adopt, provided the marriage is solemnised with open doors between the hours of 8 a.m. and 2 p.m. in the presence of two or more witnesses, and provided the parties make the declaration stated in sect. 29 of the Act (see also 26 Vict. c. 27, s. 7, and 36 Vict. s. 16), and by sect. 37 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 (33 & 34 Vict. c. 110). Special license to marry at any convenient place in Ireland may be granted by the heads of various churches to persons who are both members of the same church.

As to Marriages in Presence of the Registrar.—These are provided for by sect. 30 of the Marriage (Ireland) Act, 1844 (7 & 8 Vict. c. 81), which enables persons to marry without religious observance, and in a place other than a registered building belonging to a religious denomination. The marriage may be celebrated after due notice and certificate according to the Act, in the presence of the registrar and in the presence of two witnesses and between the prescribed hours, the parties making the prescribed declaration.

ESSENTIAL SOLEMNITIES (SCOTLAND).

The law of Scotland upon the essentials of marriage still rests upon the basis of the canon law as it existed before the Council of Trent.

The primary essential is the mutual consent *de præsenti* of the parties to enter into the married state.

Regular Marriages.—The marriage is regular, if celebrated (1) after due proclamation of banns (or after notice and certificate under the Act of 1878 aftermentioned) and (2) in the presence of a minister of religion performing the ceremony.

By an Act of the Scotch Parliament passed in 1685, and for a long time afterwards, it was essential to a regular

marriage that the ceremony should be performed by a minister of the Church of Scotland as by law established. Now by the Marriage (Scotland) Act, 1834 (4 & 5 Will. IV. c. 28), priests and ministers not of the established Church are placed upon the same footing, and all marriages celebrated after due proclamation of banns and by a priest or minister, whether of the established Church or not, are equally regular. By the Marriage Notice (Scotland) Act, 1878 (41 & 42 Vict. c. 43), the notice and certificate prescribed by the Act may be substituted for the proclamation of banns, and a marriage celebrated by any minister, clergyman, or priest after such notice and certificate shall be a regular marriage as if it had been celebrated after due proclamation of banns.

Irregular or Clandestine Marriages.—By the common law of Scotland following the canon law, the one essential, as already sufficiently explained, is the consent *de præsenti* to enter into the marriage state. But to guard against the setting up of a marriage upon an equivocal basis, rules of evidence have been established, which in effect enter into the essence of the matter. The consent must be interchanged in presence of witnesses or in writing; or else, in an action for declaring the marriage, the party alleging the consent may refer it to the oath of the party charged with it, whose answer upon such oath is conclusive. The consent *de præsenti* is also presumed if cohabitation follows on the faith of a promise to marry previously given. But to establish marriage in this way, the promise must be in writing, or may be referred to the oath of the party charged with it.

The Scotch law, as above described, was formerly often taken advantage of to avoid the stringent conditions of the English marriage law as they existed from the time of Lord Hardwicke's Act; and, particularly, owing to the English law relating to the property of married women, was taken advantage of by adventurers to gain the possession of the persons and property of young heiresses by marriage without the consent of parents or guardians, and without making

C.

F

a settlement. A runaway match was made to Scotland; and, across the border (where Gretna Green was found a convenient place), the parties were married in presence of a witness or witnesses, and with the exchange of marriage lines (*i.e.* written acknowledgments). This practice was put an end to, or rendered much more difficult, by the Marriage (Scotland) Act, 1856 (19 & 20 Vict. c. 96), commonly known as Lord Brougham's Act, by which it was enacted that after the 31st December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony should be valid, unless one of the parties at the date thereof had his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage. The Act also provides the means of registering an irregular marriage on the parties proving to the satisfaction of the sheriff that they had complied with the conditions of the Act, and obtaining the sheriff's certificate to that effect, and his warrant to have the marriage entered on the register. A copy of this entry, signed by the registrar, is received in all the Courts in the United Kingdom as evidence (*a*) of the marriage, and of the previous residence of 21 days in Scotland.

“**Habit and Repute**”—that is to say,

“by living a long time together and getting a married repute” (*b*)—

has been treated by some writers as another way of constituting marriage in Scotland. This is not really a mode of constituting marriage, but merely a kind of evidence from which marriage may be presumed. The presumption was expressly enacted by an Act of the Scotch Parliament in 1503, passed in favour of widows who claimed their *terce* (or *dower*). The presumption does not belong exclusively

(*a*) By the side-note in the printed statutes, it is said to be “conclusive” evidence. This note is not part of the statute, and is, of course, nonsense. Where there is a clear proof that there was no residence according to the Act, the Court in England will not regard the certificate as a bar to pronouncing decree of nullity.

(*b*) This is a line borrowed from a metrical version of the Scotch law of marriage by a witty judge—the late Lord Neaves.

to Scotch law, though in Scotland it may have been frequently called in aid, owing to the difficulty of producing more direct evidence of the constitution of the marriage. In England, on the contrary, there is a much stronger presumption that where there has been a valid marriage, it could be established by positive evidence.

JURISDICTION OF COURTS AFFECTING MATRIMONIAL STATUS.

England.—Formerly jurisdiction to pronounce decrees affecting the matrimonial relations was exercised only by the Ecclesiastical Courts. These Courts had (before Lord Hardwicke's Act of 1753) jurisdiction to compel parties to celebrate *in facie ecclesiæ* a marriage contracted *per verba de præsentī*, and even one contracted *de futuro*, if cohabitation had followed. They had, up to the year 1857, continued to exercise jurisdiction, where the forms of marriage had been gone through, to declare the supposed marriage void on the ground of consanguinity, and (by Lord Lyndhurst's Act, 5 & 6 Will. IV. c. 54) as to marriages celebrated after 1835, on the ground of affinity within the prohibited degrees, or of physical incapacity of one of the parties, or other grounds on which a marriage was declared by statute to be void. They had jurisdiction to decree separation *a mensâ et thoro*, in the case of adultery, or intolerable ill-temper, in either of the parties. And they had jurisdiction in suits for "restitution of conjugal rights" and "jactitation of marriage" (more appropriately called in Scotland actions of "adherence," and of "putting to silence") to order return of a deserting spouse, or to declare non-existence of a marriage alleged by one of the parties.

The jurisdiction thus formerly exercised by the Ecclesiastical Courts was transferred by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85) to the Court for Divorce and Matrimonial Causes constituted by the Act; and extended powers were conferred upon that Court, by the same Act and the Matrimonial Causes Act, 1858 (21 & 22 Vict.

c. 108). The jurisdiction of all these Courts is now vested in the Supreme Court of Judicature, and exercised by the Probate Division of the High Court of Justice as constituted under the Judicature Acts. By the Summary Jurisdiction (Married Women) Act, 1895, a Court of Summary Jurisdiction is empowered, in cases of aggravated assault or desertion by the husband, to make an order equivalent to a decree of separation.

Before the above-mentioned Acts of 1857 and 1858, there was no Court in England empowered to pronounce a decree dissolving a marriage which had been duly celebrated between parties competent to contract a valid marriage, and in a valid manner. The only way of obtaining a divorce *a vinculo matrimonii* was by a private Act of Parliament, for which the Bill was introduced in the House of Lords after a decree for divorce *a mensâ et thoro* had been pronounced by the Ecclesiastical Court. And a necessary preliminary to this, in the case of adultery of the wife, was an action for criminal conversation against the seducer if he could be discovered. Now, under the above-mentioned Acts, a husband may present a petition to the Court praying that his marriage may be dissolved on the ground of the adultery of the wife; and the wife may present a petition against the husband for dissolution of the marriage on the ground of incestuous adultery, or bigamy with adultery, or adultery with cruelty or desertion, or of rape or certain infamous crimes (20 & 21 Vict. c. 85, s. 27). On a petition presented by the husband, the alleged adulterer must, except on special grounds to be allowed by the Court, be made a co-respondent, and, in case of the wife's petition, the Court may direct the person with whom the husband is alleged to have committed adultery to be made a respondent (20 & 21 Vict. c. 85, s. 28), and damages may be awarded by a jury accordingly (20 & 21 Vict. c. 85, s. 33). Or the Court may, at the close of the evidence for the petitioner, direct the co-respondent or respondent, as the case may be, to be dismissed from the suit (21 & 22 Vict. c. 108, s. 11).

Where the Court finds that the petitioner has been accessory to, or conniving, or has condoned at the adultery complained of, or that the petition is collusive, the Court is bound to dismiss the petition. But if the petitioner has proved his case, and the Court finds none of these grounds for dismissal, the Court is bound to pronounce decree of divorce, except in the following cases, where the decree is discretionary, namely, if the Court finds that the petitioner has been guilty of (a) adultery, (b) unreasonable delay in presenting the petition, (c) cruelty, or (d) desertion or wilful separation, or such wilful neglect or misconduct as has conduced to the adultery complained of (20 & 21 Vict. c. 85, ss. 29–31).

In any suit for divorce, as well as in suits for judicial separation or for decree of nullity, the Court has a discretionary power to make orders with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of the suit (20 & 21 Vict. c. 85, s. 35).

Scotland.—In Scotland, actions for divorce *a vinculo matrimonii*, as well as for the other purposes of matrimonial suits in England, have been allowed without any statutory authority. The jurisdiction is now vested in the Court of Session, as successors to the Commissary Courts, who, after the Reformation, replaced the Ecclesiastical Courts acting under Papal authority. The most important difference between the sphere of action of the Scotch and that of the English Court, is that the Court in Scotland may pronounce a decree of divorce *a vinculo matrimonii*, at the instance of the wife, on the ground of the husband's adultery, without circumstances of aggravation.

An important consequence of a decree for divorce in Scotland, whether by reason of adultery or of desertion, is the forfeiture of property by the guilty party. This is provided for by an Act of the Scotch Parliament passed in the year 1573 (Acts of Scotch Parliament, 1573, c. 55). This Act relates expressly to divorce on the ground of

desertion without reasonable cause. It lays down the procedure in such a case culminating in a sentence of excommunication, and directs that sentence being pronounced shall be a sufficient cause of divorce, and the party offender "to tyne and lose their tocher and *donationes propter nuptias*." The effect has been stated on the high authority of Lord Stair to be that, whether the divorce be for desertion (as expressly provided by the Act) or for adultery, "the party injurer loseth all benefit accruing through the marriage, but the party injured hath the same benefit as by the other's natural death" (Stair's Inst. I. 4, 20). And it has been decided by the House of Lords, in a case of divorce for the husband's adultery, that the offending husband forfeited to the wife all benefit from the fund comprised in the marriage contract, including the part of the fund contributed by the husband himself: *Harvey v. Farquhar* (H. L. 1872), 10 Macph. (H. L.) 26; Paterson, 1992.

In Scotland recrimination is no bar to an action of divorce. If the defender alleges adultery on the part of the other, he or she may get a decree of divorce in a cross action, and thereby the consequences as to forfeiture, etc., would appear to be neutralised. But for the defender to allege cruelty on the part of the other would be simply irrelevant. Adultery being proved and condonation not being shown, decree of divorce follows as of right, and the Court has no discretion: *Lockhart v. Henderson* (1799), Morr. Dict. Appendix, Adultery, No. 1.

Ireland.—It has already been shown that the laws of Ireland relating to marriage remained, long after the statutory enactments relating to England, substantially based upon the canon law. The jurisdiction in matrimonial suits continued to be exercised by the Ecclesiastical Courts, which were unaffected by the English Acts of 1857 and 1858. And the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 (33 & 34 Vict. c. 110), which (by sect. 7) transferred the jurisdiction of the Ecclesiastical Courts in matrimonial causes to the new Court

constituted by the Act, did not extend the jurisdiction of that Court beyond the jurisdiction then exercised by the Ecclesiastical Courts. And that jurisdiction was restricted, as was that of the old Ecclesiastical Courts in England, to decrees of separation *a mensâ et thoro*, suits of nullity of marriage, and suits for restitution of conjugal rights or jactitation of marriage.

In Ireland, therefore—if the husband is domiciled there—the only means of dissolving a marriage is by obtaining an Act of Parliament by Bill introduced in the House of Lords according to the practice formerly used in England.

EFFECTS OF MARRIAGE IN REGARD TO PROPERTY.

England and Ireland.—By the common law of England marriage operated as a conveyance to the husband of an absolute interest in the wife's personal property, and of an interest for their joint lives in her real property. The husband's interest in the real property was extended, in the case where the wife was entitled to an estate of inheritance in possession in the land, and a child of the marriage born alive, to an interest for his life (as tenant by curtesy) in case of his survivance. As to the wife's leasehold interests in land, or chattels real, it was in the husband's power to dispose of them by any deed or transaction *inter vivos*, though he could not in his wife's lifetime dispose of them by will. If he survived his wife, he took the leaseholds *jure mariti*, and without the necessity of taking out administration to her.

At common law, and in the absence of a power under an ante-nuptial contract or some other instrument of settlement, the wife was unable during coverture to dispose of her legal estate in realty, unless with the concurrence of her husband and by deed acknowledged pursuant to the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), which provided the mode of conveyance in place of the more cumbrous system of levying a fine previously used.

As to the effect of coverture upon contracts, it followed

from the common law doctrine of the merger of property of the wife in that of her husband, that, at common law, the husband and wife were incapable of contracting with each other so as to have any legal effect upon property. They were equally incapable, with any legal effect, of making gifts to each other. But in equity a married woman could make a contract with her husband so as to bind her separate estate. A married woman was also, at common law, incapable of entering into a contract with third persons so as to be binding on herself or her property, though she might, under an authority express or implied given her by her husband, enter into a contract on his behalf so as to bind him. Nor could she, at common law, acquire, whether by gift or contract, any real or personal property without her husband's consent. Nor could she make a valid will unless consented to and confirmed by her husband. All these disabilities were modified by the practice of the Courts of Equity, in respect of the separate estate which by the doctrine of these Courts she was allowed to acquire; and it will be seen that under the modern Married Women's Property Acts these disabilities have practically disappeared.

The rights of the husband and disabilities of the wife in regard to property, at common law, have been much modified in practice by settlements creating trusts, to which effect has been given by Courts of Equity, exercising or inheriting the jurisdiction of the old Court of Chancery. In case of a lady of property acting under professional advice, it was uniformly the practice to insist upon the execution, before marriage, of a proper settlement. By the settlement made with the concurrence of the intended husband, the lady's property was conveyed to trustees, upon trusts securing the income to her separate use independently of her husband, sometimes with a restraint against anticipation, which has been held to be valid so long as the coverture lasted. A reversionary life interest was usually provided in favour of the husband, and the *corpus* of the property secured for the children of the marriage, with

power of appointment reserved to the wife (or the husband and wife jointly) which might, or might not, to some extent override the provisions in favour of the children. In default of exercise of these powers, the reversion of the *corpus* was usually given to the next of kin of the wife as if she had died unmarried. Besides settling the property to which the wife was entitled at the time of the marriage, there was sometimes a covenant inserted, to which the intended husband was a party, that all property which should come to the wife during the coverture should be settled in the same way.

The separate estate, or right for her separate use, which a married woman had under a trust, was an equitable estate; that is to say, an estate which, while ignored by the old Courts of Common Law, was recognised and protected by the Court of Chancery. A separate use might also have been created in the wife by an instrument operating by the Statute of Uses independently of the marriage settlement; and where that had been done without the intervention of trustees, the husband (according to the doctrine of a Court of Equity), while acquiring the legal estate *jure mariti*, was himself a trustee for the purpose of giving effect to the separate use. Where according to the provisions of the instrument creating the separate use, there was a restraint against anticipation, the trustee or trustees were bound to give effect to it, and a purchaser from the married woman so restrained did not get a good title to the income payable in future. But where there was no such restraint the married woman was (according to the doctrine of Courts of Equity) free to deal with the property so settled to her separate use, whether income or capital, and whether in possession or in reversion (*Sturgis v. Corp* (1806), 13 Ves. 190; 9 R. R. 169), as if she had not been married.

Another principle established by Courts of Equity in modification of the common law doctrine was the wife's equity to a settlement. This right arose in cases where personal property of the wife was so situated that the husband could not obtain possession of it without resort to a Court

of Equity. The Court would, as a condition of his obtaining part of the property, compel him to make a settlement of the rest. The principle applied equally whether the husband claimed the property as plaintiff in a suit in equity, or claimed in his marital right property of the wife which had been brought into Court in any suit or proceeding under the jurisdiction inherited from the Court of Chancery.

The above principles of law and equity, which applied generally to England and Ireland, were first modified by statute by the Married Women's Property Act, 1870. By this Act (33 & 34 Vict. c. 93) it was enacted that property of a married woman under the following heads should be deemed and treated as her separate property, viz. (1) all earnings of a married woman acquired or gained by her own exertion after the passing of the Act, and all investments of such earnings; (2) deposits in savings banks by a married woman (otherwise than of moneys of her husband made without his consent); (3) property of a married woman in the funds, shares, or stock in a joint stock company, or in an industrial and provident society when registered at her request in her name as a married woman entitled for her separate use; (4) personal property coming to a married woman as next of kin to an intestate, and personal property not exceeding £200 coming to her by deed or will; (5) the rents and profits only of real property descending upon a woman married after the passing of the Act, as heiress or co-heiress of an intestate.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 22, the Act of 1870 was repealed, but with the proviso (*inter alia*) that the repeal should not affect any act done or right acquired while the former Act was in force: and by the Act of 1882, sect. 1, a married woman is capable (1) "of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee;" and (2) "of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and

of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her." And, by sect. 2, every married woman married after the 1st of January, 1883, is entitled "to have and to hold as her separate property and to dispose of in manner aforesaid" all real and personal property which belongs to her at the time of marriage, or is acquired by or devolves upon her after marriage, "including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which is she engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill." By sect. 3 of the same Act any money or other estate of the wife lent or entrusted by her to her husband for any trade or business, carried on by him or otherwise, shall be treated as assets of her husband in case of his bankruptcy under reservation of the wife's claim to a dividend after claims of other creditors for valuable consideration have been satisfied. And, by sect. 5, every woman married before the commencement of the Act is entitled "to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder," accrues to her after the commencement of the Act, "including any wages, earnings, money, and property so gained or acquired by her as aforesaid." And, by sects. 6 and 7, all deposits in a bank, or stock in the funds, or stock or shares in any corporation or industrial or provident society, which, at the commencement of the Act, are standing in the sole name of a married woman, or after the commencement of the Act are allotted, transferred, placed, or registered in her sole name, are *primâ facie* to be deemed her separate property. And, by sect. 11, a married woman may effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

By sect. 19 of the same Act, "no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage; and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

The power of a married woman to contract so as to render her separate estate liable under sect. 1 (2) of the Married Women's Property Act, 1882, was so interpreted that separate estate was not bound by the contract unless it was shown that at the time of the contract she had some separate estate (*Palliser v. Gurney* (1887), 19 Q. B. D. 519; 56 L. J. Q. B. 546; *Stogdon v. Lee* (C. A.) 1891, 1 Q. B. 661; 60 L. J. Q. B. 669). By the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), the effect of these decisions is counteracted with regard to contracts made after the date of the Act (Dec. 5, 1893). The enactments are as follows:—

"1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discoverable be possessed of or entitled to:

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

"2. In any action or proceeding now or hereafter instituted

by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

“3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.”

The last-cited section refers to the enactment of the Wills Act (1 Vict. c. 26, s. 24), which directs that a will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator. This section overrides a decision of PEARSON, J., in the Chancery Division: *In re Price, Stafford v. Stafford* (1885), 28 Ch. D. 709; 54 L. J. Ch. 509.

The result of the modern law appears to be to put a married woman, as regards property, in all respects in the same position as a single woman, or of a man, subject only to the difference that a restraint on anticipation imposed as a condition of a gift or settlement of property (other than a settlement made by the woman herself of her own property) is effectual (except as to costs which may be ordered by the Court under the 3rd section of the Act of 1893) to prevent the property or income being disposed of or anticipated by her during the coverture.

Rights of the Surviving Husband and Wife respectively in the Other's Property.—From the old law which gave the wife's personal property to the husband absolutely, it followed that at the wife's death he was entitled to what then remained of it. So far as the property consisted of specific chattels or money, it appears that he was entitled to it without taking out administration. Only, in order

to get possession of outstanding property, consisting of rights enforceable by action or rights in reversion, it was necessary for him, in the first instance, to obtain the grant of administration (to which he was entitled as of right) from the Courts administering or inheriting the old ecclesiastical jurisdiction. These rights are modified by the Married Women's Property Acts, so far that (1) as the married woman may make contracts independently of her husband, so she may have creditors entitled to be paid out of her estate, and therefore the husband taking out administration must administer to the whole estate, whether consisting of tangible chattels in possession, or rights of action, or reversionary rights. (2) As the married woman has full testamentary power both to appoint executors and to dispose of her property, it is only so far as she has not exercised those powers, that the husband's right to the administration of her property, whether for paying the wife's creditors or for his own benefit, remains. But there is no question that, subject to the rights of creditors and in the absence of other testamentary disposition by the wife, the husband is entitled to take out administration for his own benefit: *In re Lambert's estate*, *Stanton v. Lambert* (1888), 39 Ch. D. 626; 57 L. J. Ch. 927.

The husband's right of curtesy, to a life interest in land of which the husband is seised for an estate of inheritance in right of his wife, or to which she is entitled for an estate of inheritance to her separate use, and which she has not disposed of by deed or will, remains unaffected by the Married Women's Property Acts: *Hope v. Hope*, 1892, 2 Ch. 336; 61 L. J. Ch. 441. This decision followed the practice of the Court of Chancery in regard to estate settled to the separate use of a married woman married before 1882: see the judgment of the Master of the Rolls in *Cooper v. Macdonald* (1878), 7 Ch. D. 288, 292; 47 L. J. Ch. 373.

Where the wife is the survivor of the husband dying intestate, the Court has a discretion, under the statute 21 Hen. VIII. c. 5, to grant administration to the widow or the

next of kin. Under the Statute of Distribution the widow is entitled to one-third of his free personal estate, if the intestate leaves descendants, and if not, to one-half. This right on the intestacy of the husband appears to be a survival of the right formerly enjoyed by widows as to the chattels of their husbands, whether testate or intestate.

The right of a wife (married on or before January 1, 1834) to dower, that is, a life interest in one undivided third, out of the lands of which the husband was seized, was, unless evaded by ingenious forms of conveyancing, formerly of some importance. In the case of persons married after January 1, 1834, the right was, by the Dower Act, 1833 (3 & 4 Will. IV. c. 105), extended so as to affect all estates of inheritance to which the husband was entitled in possession, whether in law or in equity; but, as the right was made defeasible by his deed or will, it has become of little importance. The analogous right, commonly called *free bench*, affecting hereditaments of copyhold or customary tenure, is unaffected by the Dower Act, 1833 (*Smith v. Adams*, 1854, 5 De G. M. & G. 712; *Powdrell v. Jones* 1854, 2 Sm. & Giff. 407). But such a right, as well as the right of curtesy in the same subjects, depends upon the custom of the manor, and may be modified accordingly.

The rights of the widow of an intestate who has died after September 1, 1890, without leaving issue, were considerably extended by the Intestate Estates Act, 1890 (53 & 54 Vict. c. 29). This Act, which extends to England and Ireland, but not to Scotland, enacts (sect. 1) that, where the net value of the real and personal estate does not exceed £500, the whole belongs to the widow absolutely and exclusively. Where the net value exceeds £500 the widow is (by sects. 2 and 3) entitled to £500 charged rateably upon the whole estate. And (by sect. 4) she has the same rights in the residue (if any) after payment of the £500, that she would have had under the previously existing law. Rules for ascertaining the net value are contained in sects. 5 and 6.

Scotland.—In Scotland, besides her right of terce (*i.e.* the life interest in a third) out of the lands of which her husband dies seised, a widow has, unless barred by her marriage contract, a right to a share of the moveables belonging to the husband, whether dying testate or intestate. This share amounts to one-third if there are issue of the marriage surviving, and to one-half if there are no such issue. The right, as well as the right to terce, may be barred by agreement contained in a marriage contract; and if not so barred, and if the husband has made a provision for the widow by will or *mortis causâ* deed, she may elect between the testamentary provisions and her legal rights.

Formerly, by the law of Scotland, the husband was entitled, during the subsistence of the marriage, to the rents and profits of all heritable estate belonging to the wife. This was called his "right of administration." He was also absolutely entitled to all personal estate, the right to which was vested in the wife at the time of the marriage, or should become vested in her during the subsistence of the marriage. This was called his *jus mariti*. These rights could only be barred or altered by the marriage contract. But by the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21), where a marriage is contracted after the passing of the Act (July 18, 1881), and the husband at the time of his marriage has his domicile in Scotland, the whole moveable or personal estate of the wife becomes vested in the wife, as her separate estate, and is not subject to the *jus mariti*; but she cannot assign the prospective income, or, unless with the husband's consent, dispose of the *corpus*.

In partial compensation for the reversionary right to the *corpus*, which was formerly included in the *jus mariti*, the 6th section of the statute gives the husband the same share and interest in her moveable estate which is taken by a widow in her deceased husband's estate by the law of Scotland. So that he is entitled, independently of her will, to one-third or one-half (according to whether there is or is not issue of the marriage surviving) of her moveable estate.

As to the heritable estate of a woman married after the passing of the Act, the rents and produce are likewise freed from the right of administration of the husband; but the curtesy, which is a reversionary life interest in the husband similar to the curtesy by the English law, is not affected by modern legislation.

Where the marriage has taken place before the Act, and unless the husband had, before the passing of the Act, made a reasonable provision for the wife in the event of her surviving him, the provisions of the Act are made (by sect. 3) to apply to any estate which the wife acquires after the passing of the Act.

Nothing in the Act is to exclude or abridge the power of settlement by ante-nuptial contract of marriage.

CONFLICT OF LAWS AFFECTING THE MARRIAGE STATUS.

The form of contracting a valid marriage depends upon the law of the place where the marriage is solemnised. The essentials to the validity of the marriage depends on the law of the domicile of the contracting parties. What is form and what is essential for this purpose is not easy to define in general terms. Banns, license, and even the consent of parents or guardian required by English law for the marriage of a minor, have been treated as forms; so that, even while Lord Hardwicke's Act was in force, which made the want of all these in England a ground of nullity, a runaway marriage in Scotland without any of these requirements has been treated in England as valid. On the other hand, where a marriage was performed in Scotland after 1856 (Lord Brougham's Act), the want of the residence required by that Act as a condition of the validity of the marriage contracted in Scotland has repeatedly been adjudged a ground of nullity by the Court in England. The capacity of the parties according to the law of their allegiance and domicile to contract a valid marriage has been held an essential; so that a man and his deceased wife's sister, being British

subjects and domiciled in England, could not evade the provisions of Lord Lyndhurst's Act (5 & 6 Will. IV. c. 54) by being married in Denmark, although such persons were capable, by the law of Denmark, of contracting a valid marriage: *Brook v. Brook* (H. L. 1861), 9 H. L. C. 193 (5 R. C. 783). And a marriage solemnised in England between first cousins, natives, and domiciled in Portugal, where such a marriage, without Papal dispensation, is void, was declared null by the English Court: *Sottomayor v. De Barros* (1877-1879), 47 L. J. P. 23; 49 L. J. P. 1 (5 R. C. 814). On the other hand, there is no valid ground for doubt that a marriage, wherever solemnised, between a man and his deceased wife's sister, each of whom were at the time of the marriage domiciled in a country where such marriage was legal, is a good marriage. And a marriage between such persons domiciled in a British colony where such a marriage is legal is now declared legal for all purposes including inheritance of English land^(a). The Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Ed. VII. c. 30). A so-called marriage in a country and under a law which permits polygamy is not recognised in England as a valid marriage: but a marriage in any country whose law regards marriage as an exclusive union is treated, if solemnised according to the law of that country, as valid in England: *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130 (5 R. C. 833); cf. *Brinkley v. Attorney-General* (1890), 15 P. D. 76; 5 R. C. 841.

A suit or action for dissolving the marriage *status* ought to be brought in the proper Court in the country where the husband is domiciled. A judgment of divorce duly pronounced by such a Court is valid everywhere: *Harvey v. Farnie* (H. L. 1882), 8 App. Cas. 43; 5 R. C. 703.

The property rights arising from the married *status* depend, generally, on the domicile of the husband, the presumption of law being that the wife's domicile follows his.

(a) This express declaration as to English land relates, of course, to the question which might have been raised upon the application of the Statute of Merton (1235), 20 Hen. III. c. 9.

CHAPTER XIII.

PARENT AND CHILD.

A LEGITIMATE child is one that is born in lawful wedlock, or within a competent time afterwards.

The legal duties of parents to their legitimate children have been stated to consist in their maintenance, their protection and education. As to their maintenance, the legal means of compelling the duty has been left to the statutes relating to the poor. By the Poor Law Relief Act, 1601 (43 Eliz. c. 2, s. 7), it is enacted that "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of the peace . . . shall be assessed. . . ." The penalty for not fulfilling this obligation was by this Act limited to twenty shillings per month. By the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 36, the penalty prescribed by the Act of Elizabeth was repealed; and the order, to be made by the justices at petty sessions (presumably according to the discretion of the justices), was made enforceable by means of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). It has been held by a majority in the Court of Queen's Bench that a wife who was living apart from her husband in consequence of his misconduct, and who had obtained an order for the custody of the child (under the age of 7 years) pursuant to the Act commonly called Talfourd's Act (2 & 3 Vict. c. 54) (a), may pledge her husband's credit for necessities supplied to the child at her request (*Bazeley v. Forder* (1868), L. R. 3 Q. B. 559; 37 L. J. Q. B. 237). The clauses of the Matrimonial Causes Acts, 1857 to 1878, which relate (*inter alia*) to maintenance of the children, are referred to below (pp. 85, 86, *post*).

(a) Since repealed and substantially re-enacted in an amended form by the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12).

The right of children to shares in the personal (or moveable) estate at the death of a parent, which was recognised by the Roman law, and still prevails in the Scotch and most Continental systems, has curiously disappeared in England. There is much evidence of a general custom anciently prevailing in England, as well as in other countries, providing for the division of moveable property on the death of a man leaving a widow and children, or both. The division was tripartite in the case of both widow and children surviving, the widow taking one-third and the children one-third amongst them. Where a widow only was left, or children and no widow, the widow or the children, as the case might be, took one-half. The rule prevailed in the customs of burghs, as well English as Scotch, dating from the twelfth century. The same rule was recognised by the Council of Cashel (Ireland, A.D. 1172) as the basis of an arrangement between the family and the claims of the Church authorities, who, in a superstitious age, were likely to get all that the deceased was able to leave for the good of his soul. In England the shares of the wife and children have been frittered away until nothing was left of them. This appears to have been owing, in the first instance, to a clause in Magna Charta, which marked the shares of the wife and children by the ambiguous phrase, "*rationabiles partes.*" Then, when this phrase had been taken advantage of to whittle down the shares to an uncertain amount, it was argued that the customs of burghs and districts where the old system of division still undoubtedly prevailed, were local customs, and these were abolished by Acts of Parliament (*a*). Ultimately, the old common law division has been considered and treated as wholly obsolete, and the deceased is free to dispose of his whole personal estate as he pleases by will.

The duty of protection required of parents for their children depends rather on moral than on legal sanctions. It is, however, so far recognised by law that a parent may

(*a*) 4 & 5 W. & M. c. 2; 7 & 8 Will. III. c. 38; 2 & 3 Ann. c. 5; 11 Geo. I. c. 18.

maintain his children in their law-suits without being guilty of the legal crime of maintaining quarrels (2 Coke Inst. 564). And a parent may justify an assault in defence of the persons of his children (1 Hawk. P. C. 131). And, where a parent, whose son had been beaten by another boy, had revenged his son's quarrel by giving the other boy a beating which resulted in his death, it has been held to be not murder but manslaughter (Cro. Jac. 296; 1 Hawk. P. C. 83).

The duty of parents to educate their children was, in England, long regarded as a merely moral obligation. But now, under the Elementary Education Acts, particularly the Act of 1876 (39 & 40 Vict. c. 79), s. 4, the duty is expressly imposed upon parents of causing their children to receive efficient elementary instruction in reading, writing, and arithmetic. This duty is enforceable by orders and penalties under the Acts. Any further duty of parents to educate their children suitably to their station in life is still allowed to be a mere moral obligation. The question of religious education is bound up with the father's right to the custody of the child, which, at common law, is absolute.

The father has consequently during his life the right to choose in what religion his children are to be brought up. This right cannot be interfered with by any agreement, antenuptial or otherwise (*Re Agar Ellis*, 1878, 10 Ch. D. 49; 48 L. J. Ch. 4; 1883, 24 Ch. D. 317; 53 L. J. Ch. 10). An exception is made in cases where the father has abdicated his rights by allowing his children for a considerable time to be brought up by others in a different religion; or where, the child being well provided for by strangers, the father capriciously endeavours to resume a custody which the Court thinks would be clearly an injury to the child (*Cruise v. Hunter*, 1790, 2 Br. C. C. 499 n.; *Lyons v. Blenkin*, 1821, Jacob 245; 23 R. R. 38; *Wellesley v. Wellesley*, H. L. 1827, 2 Bligh. N. S. 124; 1 Dow. & Cl. 152; *In re Newton*, C. A. 1896, 1 Ch. 740; 65 L. J. Ch. 641).

By the Matrimonial Causes Acts, 1857 to 1878, powers are given to the Court having jurisdiction in the matrimonial

cause to make suitable arrangements with regard to the maintenance, custody, and education of the children, the marriage of whose parents is the subject of the suit. See in particular the Act of 1857 (20 & 21 Vict. c. 85), ss. 33, 35, and 45; the Act of 1859 (22 & 23 Vict. c. 61), s. 4, and see the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (b). There is a provision in the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), s. 2, that an agreement in a separation deed shall not be held invalid by reason only of its providing that the father shall give up the custody or control of an infant to the mother; provided that no Court shall enforce the agreement against the benefit of the infant.

The former power of a father to exercise control, after his death, by the appointment of a testamentary guardian, has been much abridged by statutes, the one now in force being the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27). The important sections of this Act are stated in the following chapter (p. 88, *post*).

Illegitimate Children or Bastards.—By the laws of other countries, which inherit the traditions of the Roman law, children born out of wedlock may be legitimated by the subsequent marriage of their parents, provided there was no intervening legal bar to their marrying. But this is not the law of England. To be legitimate, a child must be born in wedlock, although not necessarily begotten in wedlock. All children born in wedlock are presumed legitimate; and the presumption cannot be rebutted except by clear proof of non-access between the parents during the whole time of conception. Children not so born are bastards.

A legal duty is thrown upon the putative father to maintain his bastard child; and the enactments for the enforcement of this duty are now contained in the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65).

The justices in petty sessions, on the application of the mother, and on her evidence, corroborated in some material particular by other evidence, may find who is the putative father, and may order him to pay a sum for maintenance not

exceeding five shillings a week until the child attains the age of sixteen years.

A bastard child cannot acquire any rights by inheritance, nor can he, unless he marries and leaves issue, have any heir or next of kin to inherit from him as such.

CHAPTER XIV.

GUARDIAN AND WARD.

THE relation of guardian and ward is derived out of the parental relation, and generally takes its place on the death of the father of a child who is under age; that is to say, according to English law, under the age of 21, while the child is still regarded as an infant incapable of making any deed affecting property, or of binding himself by any contract. In cases where an estate is left to an infant whose father is alive, the father himself is said to be, by the common law, the guardian of the child, and must, on the child coming of age, account to him for the profits, like any other guardian. The rights and duties of guardians so far differ from those of parents, that the guardian is not obliged to maintain the ward except from the ward's own estate. On the other hand, the guardian has no more right to the labour and services of his ward than any stranger.

By the statute 12 Chas. II. c. 24, which abolished most of the incidents of feudal tenure, various other tenures were turned into free and common socage. An incident of that tenure was to commit the guardianship of an infant to the next of kin upon whom the inheritance cannot possibly descend. That guardianship, which only took effect in case of an infant having a legal estate in land, lasted until the age of 14, at which age the minor was entitled to choose his own guardian. But by sect. 8 of the same statute, the father of a child who was an infant and unmarried at the time of his death, was empowered by deed or will to dispose of the custody and tuition of the child until attaining the age of 21 years. The guardian so appointed (commonly

called the testamentary guardian) superseded the guardian in socage, as well as the right of the infant at 14 to choose a guardian. Parallel to the statutory right of the father to appoint a guardian, the Court of Chancery early assumed the power of appointing a guardian as well of the estate as of the person (*Wellesley v. Wellesley* (1828), 2 Bligh. N. S. 124; 31 R. R. 15); and that power, like all other powers of the Court of Chancery, is now vested in the High Court of Justice, and is usually exercised by a judge of the Chancery Division. The appointment by the Court supersedes all other appointments. The paramount consideration for the Court in making the appointment is the interest of the child, although the Court requires good cause to be shown for superseding the appointment by the father under his statutory power, and will pay regard to the wishes of the mother. Where no other guardian had been appointed, the Court might appoint the mother as being the proper guardian by nature and nurture. Her guardianship, if not superseded by the election of the infant at 14, or by the appointment of a new guardian by the Court, continued until the infant attains 21.

By the Matrimonial Causes Acts, 1857 to 1878, powers are given to the Court having jurisdiction in the matrimonial cause, to make suitable arrangements for the custody of and access to children, and for settlements of property. See 20 & 21 Vict. c. 85, ss. 33, 35, 45; and 22 & 23 Vict. c. 61, s. 4. And by the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (b), power is given to the Court of Summary Jurisdiction to make an order including a provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of 16 years, be committed to the applicant.

The Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27) contains important provisions modifying the existing legal rights, and, in particular, extending the rights of the mother of an infant in respect of guardianship. By sect. 2 of this Act, on the death of the father of an infant, the

mother, if surviving, is made the guardian of the infant, either alone, where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. Where no guardian has been appointed by the father, the Court may appoint a guardian to act jointly with the mother. By sect. 3 (1) the mother may by deed or will appoint a guardian to act after the death of herself and the father; and where guardians are appointed by both parents they shall act jointly; (2) the mother may by deed or will provisionally nominate a guardian to act after her death jointly with the father; and the Court may, if it is shown that the father is unfit to be sole guardian, confirm the appointment or make such other order as to the guardianship as they think right. By sect. 5 the Court may, upon the application of the mother, make such order as it thinks fit regarding the custody of, and the right of access to, the infant, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father. And by sect. 7, where a decree for judicial separation, or a decree, *nisi* or absolute, for divorce is pronounced, the Court may thereby declare the parent, by reason of whose misconduct the decree is made, unfit to have the custody of the children of the marriage, and in such a case the parent so declared unfit, shall not, upon the death of the other parent, be entitled, as of right, to the custody or guardianship.

The Court has still jurisdiction under this Act, as it had before, to remove a guardian, although the infant is not a ward of Court or possessed of property; and, whether under the Act or otherwise, the paramount consideration for the Court in removing a guardian or appointing a joint guardian, is the welfare of the infant: *In re McGrath* (C. A.) 1893, 1 Ch. 143; 62 L. J. Ch. 208; *R. v. Gyngall* (C. A.) 1893, 2 Q. B. 232; 62 L. J. Q. B. 559; *In re Newton* (C. A.) 1896, 1 Ch. 740; 65 L. J. Ch. 641.

There are various Acts of Parliament under which guardians may be appointed to an infant for special purposes. And, under the Settled Land Act, 1882, a person (who is in

effect a guardian for the special purpose) may, under sect. 60, be appointed by the Court to exercise on behalf of an infant the powers of a tenant for life under the Act.

Where a person is found lunatic by inquisition, an appointment is made of a committee of his person and estate. The committee of the person is chosen with regard to the personal welfare of the lunatic, and is generally a different person from the committee of the estate, who is charged with the care of the property. The committee of the estate is charged with the management much like other guardians, and is bound to account either to the Court by whom he is appointed, or to the ward on his recovery, or to the ward's personal representatives after his death. Special powers of dealing with the estate are exercised by order of the Court under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 120, 124.

CHAPTER XV.

MASTER AND SERVANT.

THE observation of Sir Henry Maine, that the progress of human institution is from *status* to contract, applies in a marked degree to the condition of service in a Christian country.

Service in the sense of the *servitium* of the Roman law has long ceased to exist in England. This was finally decided in 1772 in the celebrated case of *James Somersett*, a heathen negro (*a*), who had been sold as a slave in Africa, and carried to Virginia, where he was sold and bought under the system of service then prevailing in that state. Having been brought to England, he ran away from his master, who seized him and carried him on board a ship, where he was confined in order to be sent to Jamaica to be sold. Lord MANSFIELD granted a *habeas corpus* ordering the captain of the ship to bring up the body of James

(*a*) So late as the year 1693 it had been held by the Court of Common Pleas that a man might have a property in a negro boy, *because negroes are heathens* (1 Ld. Raym. 147).

Somerset, with the cause of his detainer. Upon the return of the writ, after elaborate argument, it was decided that the heathen negro, when brought to England, owed no service to an American or any other master. And he was liberated accordingly.

In the case of menial servants, a class including domestic servants but of a somewhat wider range (*a*), there is a presumption that the hiring is for a year. But notwithstanding this presumption, and even although the hiring is expressly for a year, there is an implied term that the service may be put an end to by a month's notice on either side. Instant dismissal of a servant may be justified by gross moral misconduct, wilful disobedience to reasonable orders, or habitual neglect of his work and duties.

The kind of service to which apprentices were bound was formerly regulated by statute, perhaps more in the interest of certain trade monopolies than for the benefit of the apprentices themselves. The most important of these statutes (5 Eliz. c. 4) was, with other enactments regulating services in various trades, repealed by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). But sects. 5 and 6 of the last-mentioned statute make it an offence punishable by a Court of Summary Jurisdiction (1) in a servant who wilfully and maliciously breaks his contract where the probable consequences are obviously calculated to endanger human life or cause serious bodily injury or expose valuable property to destruction or serious injury; and (2) in a master, who, being legally bound to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse neglects to provide the same so as seriously to injure or endanger the health of the servant or apprentice.

By the Employers and Workmen Act, 1875 (38 & 39

(*a*) A head gardener living on the grounds within the domain has been held to be a menial servant (*Nowlan v. Ablett* (1835), 2 Cr. M. & R. 54). So has a huntsman, on the ground of the personal relations between him and the master of the hounds (*Nicoll v. Greaves* (1864), 33 L. J. C. P. 259). The implied term as to a month's notice was established in both these cases.

Vict. c. 90), a County Court has jurisdiction by sect. 3 (a) to adjust and set off claims on either side arising out of the relation between employer and workman, or (b) to rescind the contract upon such terms as to apportionment of wages or payment of wages or damages as the Court thinks just. By the same Act (sect. 4) a Court of Summary Jurisdiction has a similar jurisdiction to a limited extent, and may (by sect. 5) adjust a dispute between an apprentice and his master. The power, as to master and apprentice, may (by sect. 6) be exercised to the same extent as in a dispute between master and workman, and further, the Court may order the apprentice to discharge his duty, or may rescind the instrument of apprenticeship, and order the whole or any part of the premium to be repaid. By sect. 10 "workman" under the Act does not include a domestic or menial servant, but means any other person, who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into or works under a contract with an employer, whether a contract of service or a contract personally to execute any work or labour. By sect. 12 an apprentice within the Act is defined as an apprentice to the business of a workman as defined by the Act upon whose binding either no premium has been paid, or the premium (if any) does not exceed £25, or to an apprentice bound under the provisions of the Acts relating to the relief of the poor.

An apprenticeship deed, whereby an infant is apprenticed, if it is disadvantageous to the infant, cannot be enforced against him under the last-mentioned Act (*Meakin v. Morris* (1884), 12 Q. B. D. 352; 53 L. J. M. C. 73). An apprenticeship deed binding an infant may be dissolved by him on coming of age and giving reasonable notice of his intention (*Coghlan v. Cullaghan*, 7 Ir. C. L. Rep. 291).

The question of employers' liability at common law is entirely one of contract; and it is treated as an implied term of the contract of service, that the servant undertakes the risks incident to the service, including those arising from the negligence of a fellow-servant. To make the

master liable there must be shown to be personal negligence on his part, either in the furnishing of safe plant and appliances for the work, or in the selection of the servant by whose negligence the damage is caused. This rule, which has, since the decision of *Priestley v. Fowler* in 1837 (3 M. & W. 1; 49 R. R. 495), been followed as law in England, has been applied to Scotland (overruling the opinion formerly prevailing among the judges there) by decisions of the House of Lords in *Bartonhill Coal Co. v. Reid* (1858), 1 Paterson, 785; 3 Macq. 266; and *Wilson v. Merry* (1868), 2 Paterson, 1597, L. R. 1 H. L. Sc. 326. The law, as laid down in these decisions, was felt to bear hardly on the workmen, and the legislature has interfered to the extent of restricting freedom of express contract. The statutes (at present in force) which have dealt with the question, in a general way, are the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42); the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37); and the Workmen's Compensation Act, 1900 (63 & 64 Vict. c. 22).

By the first of these Acts the master was, in effect, made liable to the workman for damage arising from neglect of other servants entrusted by the master with certain responsible duties. The two latter Acts went further, and provided that in certain employments, and subject to certain conditions and limitations, a workman might (notwithstanding express contract) recover compensation for personal injury by accident in the course of his employment.

By the Workmen's Compensation Act, 1906 (6 Ed. VII. c. 58), which comes into operation from the 1st of July, 1907, the Acts of 1897 and 1900 are repealed as from that date. The Act of 1906 substantially embodies the provisions of the Acts of 1897 and 1900, and extends them to all employments with certain express conditions.

Another consequence of the English common law, that the servant undertakes the risks incident to the service, was that the crew engaging in a ship were supposed to undertake the risk of the vessel being unseaworthy. Now, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), embodying

the provisions of earlier Acts, it is (by sect. 457) made a misdemeanour in a shipowner knowingly to send a ship to sea in an unseaworthy state so as to be a danger to life. And by sect. 458 it is enacted as follows: "(1) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage.

"(2) Nothing in this section—

- (a) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the sending of the ship to sea in such a state was reasonable and justifiable; or
- (b) shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession."

A master may become liable to third persons for the tortious act of a servant. The criterion of the responsibility is whether the servant was acting within the course of his master's business and with the intention of serving the master's benefit. If so, the master is responsible, as he would be for the act of an agent acting within the scope of his authority. Under these conditions the master may become responsible for the tortious act of a servant whether it be merely a negligent act, or a wilful trespass, or even a fraud upon the person injured: *Limpus v. General Omnibus Co.* (1862), 1 Hurl & Colt. 526; 32 L. J. Ex. 34; *Bayley v. Manchester, etc., Railway Co.* (Ex. Ch. 1873), L. R. 8 C. P.

148; 42 L. J. C. P. 148; 25 R. C. 115; *Barwick v. English Joint Stock Bank* (Ex. Ch. 1867), L. R. 2 Ex. 259; 36 L. J. Ex. 147; 12 R. C. 298. But where the servant is on a frolic of his own (*Joel v. Morison*, 1834, 6 Car. & P. 50, 40 R. R. 814), or where he misemploys his position merely to serve his private ends, the master is not responsible. *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (C. A. 1887), 18 Q. B. D. 714; 56 L. J. Q. B. 449.

The relation of master and servant has been curiously assigned by English law as the ground of the action for damages which may be brought by a parent against the seducer of his daughter. In this action, the daughter is always alleged to be the servant of the plaintiff, and the cause of action is based upon the consequential loss of services. The services may be of the slightest kind, such as making tea, etc.; and, so long as the daughter was living in the parent's house, the relation of master and servant would be presumed. On the other hand, the damages recoverable are not necessarily measured by any actual loss of services, but may be given according to the circumstances of aggravation in the particular case: *Grinnell v. Wells* (1845), 7 M. & Gr. 1033. The action is competent also to a brother, an aunt, or an adoptive father in whose house the person seduced has lived, or even to a stranger where the relation of master and servant actually exists between them. But, *e converso*, the father of a girl who has been sent out to service among strangers has no such remedy.

The right of one to the personal service of another has been held to give a cause of action to the former against a third person who intentionally induces the servant (or person owing the service) to break his contract so as to cause, as a natural consequence, loss to the first person: *Lumley v. Gye* (1853), 2 Ell. & Bl. 216; 22 L. J. Q. B. 463; *Bowen v. Hall* (C. A. 1881), 6 Q. B. D. 333; 50 L. J. Q. B. 305; *Quinn v. Leathem*, 1901, A. C. 495; *South Wales Miners' Federation v. Glamorgan Coal Co.*, 1905, A. C. 239. But on the other hand, an inducement to put an end to the relation of master and servant, not involving a breach of contract for service, and

not accompanied by acts of personal violence, or constituting an attack on property, is not actionable, even where the person promoting the dissolution of the relation is, according to the express finding of a jury, actuated by malice. *Allen v. Flood* (H. L. 1897), 1898, A. C. 1; 67 L. J. Q. B. 119.

So far as relates to a trade union engaged in a trade dispute, the law as applied in *Quinn v. Leathem* and *South Wales Miners' Federation Co. v. Glamorgan Coal Co.* (referred to on p. 95) was altered by the Trade Disputes Act, 1906 (6 Ed. VII. c. 47, s. 3), by which it is enacted as follows:—

“3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.”

PART II.—OWNERSHIP OR PROPERTY.

CHAPTER XVI.

PROPERTY IN GENERAL, AND PARTICULARLY IN LANDS, TENEMENTS, AND HEREDITAMENTS.

PROPERTY, or ownership, in the ordinary acceptation of the term, is a right residing in a person, over or to a person or thing, and availing against other persons generally. It is "a right to use or deal with some given subject, in a manner, or to an extent, which, though not unlimited, is indefinite" (Austin's Lectures on Jurisprudence, Lecture 14, 3rd ed., p. 382). It includes, generally, the right to exclude other persons from the use or dealing with the same subject. Thus I have (practically) a right, in common with all the King's subjects, to the enjoyment (under proper regulations) of Hyde Park and Kensington Gardens. But this is, in no sense of the word, a right of property.

According to the above definition, the subject of property may be a power or a thing. But, although the subject of property, in the wider sense, may be a person, this, in English law, can only be the case in a very limited sense. As it has already been shown in the discussion of *Status*, the *status* marked by the opprobrious term "slavery," or that of a person bound to render unlimited service to another, has long ceased to exist in English law. And although the *status* constituted by the relation of parent and child, master and servant, and the like, implies a right in the nature of property in the wider sense of the word, it is convenient, in treating of property in the narrower and popular sense, to regard the subject of property as a thing.

Things, the subject of property, have been classed as corporeal and incorporeal. Land, in the proper sense of the word, is corporeal. So are cattle, furniture, jewels, etc., and anything else which has an obvious and tangible existence. But there are other subjects of property which are only conceived by the aid of the imagination, and exist by a fiction of law. These are said to be incorporeal. So advowsons, tithes, and tithe rent-charges, and other rent-charges, commons, and ways, though intimately connected with land, are classed as incorporeal. So are offices, dignities, and franchises. All these, having regard to the distinction presently to be mentioned between real (or heritable) and personal property, are called "incorporeal hereditaments." Other incorporeal things or subjects of property are shares in the funded debt of the State, commonly called consols, etc., shares in incorporated companies, and obligations or debts, which, apart from the creditor's right as against the respective debtors in the obligation, may be regarded as property. Thus the executor or administrator of a deceased person has a right of property in the credits belonging to the estate, as well as his right *in personam* against the respective debtors.

Again, corporeal things may be classed as immoveable or moveable—a distinction of which the meaning is obvious, but which has little legal significance except so far as it historically forms a sort of basis for the more comprehensive division to be next mentioned.

All property is regarded by English law as belonging to one or other of the two great classes of "real" (in the sense of heritable) and "personal" property. This division, which, so far as relates to corporeal things, nearly coincides with that between immoveable and moveable things, pervades the whole range of things which are the subjects of property, whether corporeal or incorporeal. The former class of property, which is commonly marked by the ambiguous and inappropriate term "real," is more appropriately marked by the term "hereditaments," and includes both corporeal and incorporeal hereditaments. The

beneficial interest in these, in the absence of other legal disposition by the owner, descends upon his death according to rules surviving from the feudal system which prevailed throughout a great part of Europe in the Middle Ages. They are called hereditaments because, according to those rules, they descend (speaking generally) to the "heir." The other class of property, consisting of everything not included in the term "hereditament," is called personal property, and, as to modes of disposition and descent, is governed by rules having their origin partly in the custom of the inferior classes of people who in feudal times were permitted to own the cattle and implements of husbandry, and partly in the customs prevailing in burghs with regard to wealth accumulated by trading.

Having thus indicated the most general divisions of the subjects of property, it seems necessary to define the meaning of various words which have been used to indicate subjects which are more or less assignable to those general divisions.

Land, in its primary meaning, is nearly equivalent to a corporeal immoveable thing. "Land," according to Coke, comprehends in its legal signification any ground, soil, or earth whatsoever, as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath; also castles, houses, and other buildings; so that, if I convey the land, the structure or building passes therewith. Land includes water covering the land, and the right to everything below as well as above the surface. So that if from a mine on adjoining land I carry a cutting into the minerals below the surface of my neighbour's land, or erect a building so as to overhang that surface, it is, in either case, a trespass upon his land. The right of support to land in its natural state is also a right of property included in the parcel of rights belonging to the owner of the land.

Private property in land is, however, by English law, subject to the exception that mines of gold and silver belong to the Crown: *Case of Mines, Reg. v. Earl of Northumberland* (10 Eliz. Hil. Term), Plowden 310 (17 R. C. 393).

Of course, the word "land," like every other word, where contained in a written instrument, may acquire, by the context, a more extended signification. And by the definition in Lord Brougham's Act passed in 1850 (13 & 14 Vict. c. 21), now incorporated into the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, the expression "land" (in every Act passed after the year 1850) includes "messuages, tenements and hereditaments, houses and buildings of any tenure." That is, "unless the contrary appears," so that one may have to look narrowly at the terms of this Act to see whether "land" includes an incorporeal hereditament, such as a tithe rent-charge.

"Tenement" is a word applied to land, as a subject of "tenure," to be hereafter explained.

"Hereditament" is a word comprising "land" in the strict sense, and all other property which, in the absence of other disposition, would descend to the heir. Hereditaments, as already explained, comprehend the same class of property which is included in the more modern, though less appropriate expression "real property." And although the term "hereditaments" probably includes everything that can be comprised in the words "lands" or "tenements," it is usual, when it is intended to speak comprehensively of all property comprised in any of these words, to use the expression "lands, tenements, and hereditaments."

"Hereditaments" have been distinguished as distributed between the two classes already referred to, of "corporeal hereditaments" and "incorporeal hereditaments." The term "corporeal hereditaments" is equivalent to "land" in the strict sense above defined. "Incorporeal hereditaments" again include various species, some of which may be here more particularly described.

A typical example of an incorporeal hereditament is an *advowson*, or the right of presentation to a church or ecclesiastical benefice. The term "advowson" appears to have been borrowed from the term (*advocatio*) in Roman law, descriptive of the service the patron rendered to his client. The origin of the right is commonly ascribed to the

circumstance of lords of manors having built churches on their domains and endowed them with glebe and appropriation of tithes, in which case the lord had by the common law the perpetual right of presentation to the church.

While the right of presentation to a vacant living is not to be sold or bought for money, there is nothing (in English law) to prevent the sale of an advowson, or even of the next presentation, while the benefice is full.

Another species of incorporeal hereditaments is that of tithes, originally a tenth part of the yearly produce of the land, which have, in comparatively recent times, been commuted into a rent-charge now recoverable from the owner of the land (Tithe Acts, 1836 to 1891) (*a*).

“Commons,” or rights of common, are certain rights of taking profits out of land exercised by persons having no right of property (in the strict sense of the word) in the land itself. These rights generally exist in unenclosed land, which has been regarded as the waste of the manor within which the land is comprised. The presumption is that the soil of the waste belongs to the lord of the manor; but the rights of pasturage, estovers (or the right of taking fuel to burn in a house), etc., are vested in the commoners, owners of tenements to whose owners the rights have been (historically or presumably) granted along with and as part and parcel of their tenements, or subsequently annexed to the enjoyment. Where the rights are such as are presumed to have been granted along with the original grant of the tenement, they are said to be *appendant*, otherwise they are called *appurtenant*. The practical difference is said to be that if a commoner purchase land in which he has common appurtenant, this extinguishes the right of common; but if it be *appendant* he enjoys it *pro rata* over the rest of the land. There may also (it is said) be a right of common in gross, where the right has been granted to a man and his heirs by deed, or is claimed by prescriptive right as existing in a person or other corporation sole.

(*a*) Short title given by 59 & 60 Vict. c. 14.

Of these rights of common, by far the most important is the right called common of pasture, which is presumed to be *appendant*, and may be described, generally, as the right of the commoner to graze upon the waste all the commonable beasts "levant and couchant" upon the tenement in respect of which the right is claimed. The number of beasts lewant and couchant, that is to say (practically) the number which the tenant can keep upon his holding having regard to the capacity of the holding aided by the right of grazing upon the waste, is presumably the measure of the right, unless the number of beasts has been definitely fixed, or stinted, in some proceeding between the commoners.

In the latter part of the eighteenth and for a great part of the nineteenth century, the policy was pursued, by numerous Inclosure Acts, of authorising, by statutory enactment, the inclosure of unenclosed commonable land, and the allotment of the several parcels in full proprietary right freed from the rights of common, amongst the lord and the persons having tenements in respect of which these rights had been previously exercised. It has also been a frequent practice for lords of the manor, under colour of the Statute of Merton (20 Hen. III. c. 4) and the Statute of Westminster the Second (13 Ed. I. stat. 1, c. 46), to enclose portions of a common, on the assumption that there was sufficient pasture left for the commoners. Probably many of these inclosures were illegal, since, where the rights have been fully inquired into, it has been found that the commonable rights are sufficient to exhaust the pasture. But, from the difficulty of proving this, and from the circumstance that the actual loss to the commoners was not a sufficient reason for embarking on an expensive inquiry, many such inclosures have been allowed to stand without challenge.

In recent years inclosure has been looked upon less favourably. The indirect advantage to the public of the existence, especially in the neighbourhood of populous centres, of tracts of unenclosed land has led to a jealous scrutiny of intended inclosures; and to the enactment of statutes favouring the preservation and regulation of

commons (a). And by the Law of Commons Amendment Act, 1893 (56 & 57 Vict. c. 57), an inclosure under the Statute of Merton and the Statute of Westminster the Second, or either of these statutes, is not valid unless it is made with the consent of the Board of Agriculture.

As to rights of water in a natural stream, a riparian proprietor has a right to the ordinary use of the water, but is not entitled to divert the water for a purpose outside the ordinary uses for the riparian tenement: *MacCartney v. Londonderry, &c., Ry. Co.*, 1904, A. C. 301; *John White & Sons v. J. & M. White*, 1906, A. C. 72.

Of easements which are rights over the land of another, and by which no tangible profit is taken, rights of way and rights of light are among the most important.

Ways, or rights of way, are rights residing in the owners and occupiers of certain land, or in certain persons, of going by a definite road or path over land belonging to another.

These private rights of way are distinguishable from public rights of way, which merely constitute an exception from the right of exclusion generally enjoyed by the owner or rightful occupier of land.

A private right of way may be enjoyed by grant of the owner of the land to certain persons or classes of persons, or to the inhabitants of a certain hamlet or village, or to the owners or occupiers of a certain farm; and the right may be acquired through immemorial user by which a grant is presumed in favour of such a class of persons. Such a right may be implied in a grant of land which can only be got at through land of the grantor.

The right enjoyed through the windows of a house to light over the neighbouring premises, was, prior to the Prescription Act, 1832 (2 & 3 Will. IV. c. 71), usually claimed upon the fiction of a lost grant, for which twenty years' uninterrupted enjoyment was received as evidence. Now it may be claimed by reason of the mere enjoyment for the period of twenty years, under the express provisions of the Act.

(a) See in particular the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), and the Commons Act, 1876 (39 & 40 Vict. c. 56).

What amount of interference with the light will entitle the owner to an injunction is a question on which judicial opinion has much varied. The decision of the House of Lords in *Colls v. Home and Colonial Stores, Limited*, 1904, A. C. 179 (a), appears to correct a tendency of the Courts to support extravagant claims. The right of support from the adjacent land to buildings which have manifestly enjoyed such support for a period of twenty years is also a right in the nature of an easement, and capable of being established either on the fiction of a lost grant or under the Prescription Act. *Dalton v. Angus* (H. L. 1879), 6 App. Cas. 740.

Offices, in which a man may have an estate to him and his heirs, are classed by Blackstone amongst incorporeal hereditaments. An office is defined by him as a right to exercise a public or private employment, and to take the fees and emoluments thereto belonging.

Dignities, which have been already described under the head of *Status* (pp. 37, *et seq.*), are also classed by Blackstone amongst incorporeal hereditaments.

Franchises are another species of incorporeal hereditaments. A franchise (or liberty) has been described as a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject. A franchise may be vested in either a natural person or in a body politic or corporation; but the same identical franchise that has before been granted to one cannot be bestowed on another, for that would prejudice the original grant.

Of franchises, the following examples, some of which are become practically obsolete or of little importance, are given by Blackstone: "To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship

(a) Compare *Jolly v. Kine*, 1907, A. C. 1.

paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures and deodands: to have a court of one's own, or liberty of holding pleas and trying causes: to have the cognisance of pleas, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county; wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like), else the franchise is illegal and void: or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty."

It will be observed that some of the expressions describing a franchise are ambiguous, so as either to mean the franchise or the land in which a franchise of the kind referred to may be exercised. The meaning may be fixed by the context of the documents in which the grant is made, and by the use which has followed upon it.

This ambiguity, in regard to the term "warren," has been a fertile source of litigation. The case of *Earl Beauchamp v. Winn*, finally decided by the House of Lords in 1873 (L. R. 6. H. L. 223), arose out of a grant in 1799 following the description in a lease of 13 Charles II. of (*inter alia*) "all that warren of conies in B., etc., and all that lodge or house thereon built, etc., and all that warren of conies, etc., in B., etc., both of which warren of conies are called or known by the name of B. warren, and do extend themselves over the wastes or moors of B., etc." After various transactions, which had taken place on the footing that the subject comprised in the grant was the mere franchise of killing rabbits, etc., a discovery was made of valuable minerals under the waste. The grant was construed, with the aid of the interpretation which had been put upon it by usage, as a grant of the franchise only. In *Robinson v. Duleep Singh*

(1879), 11 Ch. D. 798, 48 L. J. Ch. 758, a subject described in a lease of 1866 as "all that warren of conies in L. as it is there marked out and described by its proper metes, boundaries, and borders," was, having regard to evidence of the interpretation acted on, at and soon after the time the instrument was executed, held by Mr. Justice FRY to comprise the land in question.

A *free fishery* (or exclusive right of fishing in a public river) has been classed by Blackstone as a royal franchise. It has been questioned on historical grounds whether any exclusive right of fishing exists, the origin of which can be properly assigned to a grant in the nature of a royal franchise (a).

An exclusive right of fishery may (as Mr. Stuart Moore shows) be either corporeal, *i.e.* including a right of property in the soil itself; or incorporeal, *i.e.* in the nature of a *profit à prendre* out of the land, reserving to the owner the rights in the soil itself. Of the former class is a right of fishing with fixed engines, such as weirs or stake-nets. To the latter class belongs a right of fishing to be exercised by boats and moveable nets only.

It is clear that in non-tidal waters either right of fishing can only be regarded as parcel of the right of ownership originally vested in the proprietor of the soil, whether the King or a subject. As to a right of fishing in tidal waters, whether such a right can be regarded as a royal franchise or not, the following points have been settled by the cases.

Primâ facie the right of fishing in navigable and tidal waters is vested in the Crown, and may be exercised by the public generally.

A subject may claim a several fishery in navigable and tidal waters by grant from the Crown.

But in order that the right should have a legal origin, such a grant from the Crown must have been made prior to Magna Charta, and this may be presumed upon the evidence of immemorial user, unless the non-existence of

(a) Stuart Moore, History and Law of Fisheries.

the right at some time subsequent to Magna Charta is proved (a).

Primâ facie the Crown is entitled to every part of the foreshore of the sea between high and low water mark (b); but proof of the ownership of a several fishery over part of the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore is in the owner of the several fishery (c).

Rents issuing out of land are also classed by Blackstone amongst incorporeal hereditaments.

The rent reserved upon an ordinary lease, where the lessor has the reversion, is, however, more properly to be regarded as incident to the property of the lessor in the land. These rents were formerly described by the name rent-service, because the *reddendo* clause generally contained some kind of service to be rendered either alone or in addition to a money payment. To such a rent the power of distress was annexed by the common law. And the lessor has, in some circumstances, a right of entry; and may be regarded as having, by his tenant, the possession of the land itself.

But rents reserved by a deed out of land in which the owner of the rent has no reversion, are properly considered to be incorporeal. Of these there were formerly two kinds: rent-charge, where the deed contained a clause giving power of distress if the rent be in arrear; and rent-seck, where the rent was reserved by deed without any such power. But the distinction between a rent-charge and a rent-seck is practically abolished by the Landlord and Tenant Act, 1730 (4 Geo. II. c. 28), s. 5, which extended the power of distress which is available in case of rent

(a) *Malcomson v. O'Dea* (1862), 10 H. L. C. 593 (12 R. C. 169).

(b) This general proposition is too well established by the cases to be now disputed; but the historical evidence collected by Mr. Stuart Moore's researches make it least questionable whether there is, in point of fact, any case in which the right to the foreshore is not parcel of the rights included in some neighbouring manor.

(c) *Attorney-General v. Emerson*, (H. L.), 1891, A. C. 649; *Hanbury v. Jenkins* (1901), 2 Ch. 401. As to proof of right to foreshore, see also *Van Diemen's Land Co. v. Table Cape Marine Board*, 1906, A. C. 92.

reserved upon a lease, to cases of rent-seck, rents of assize, and chief rents. A rent-charge is frequently created by devise, or by a deed operating under the Statute of Uses (27 Hen. VIII. c. 10, ss. 4, 5), whereby the land is granted to the use that X. and his heirs may receive a rent out of the land. In addition to a power of distress, such an instrument may give power to the person entitled to the rent, after default, to enter upon the premises and to receive the rent and profits until all the arrears of the rent-charge are satisfied. The Statute of Uses is also frequently employed to effect what is equivalent to an apportionment of the rent, when the land on which it is charged is divided upon a purchase or otherwise. The usual method is to state the respective amounts which the divided parcels are to bear, and to give cross powers of distress and entry to the owners of the several parcels in case they are compelled to pay more than their share. By the Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 10, the Inclosure Commissioners (now amalgamated with the Board of Agriculture) are empowered to apportion rent-charges among the several parcels of land on which they are charged.

Rents of assize have been described as certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied (*a*). Those of the freeholders are frequently called "chief rents," and both sorts are commonly called "quit rents." These are also properly comprehended in the term "incorporeal hereditaments."

Besides the rights of private persons qualifying the general right of property in land belonging to another, the right of the proprietor is frequently subjected to, or restricted by, certain rights of the public generally to make a particular use of the land or certain portion of it for a certain limited purpose. Of these, the most frequent and among the most important are public rights of way.

(*a*) Co. Inst. 19, Blackstone, vol. 2, bk. 2, ch. 3, p. 42. The right to the rents and fealty (which is now merely nominal) reserved upon the grant of a fee-simple before the Statute *Quia Emptores* (18 Edw. I. c. 1) is sometimes called a "seignory." When this right became severed from the estate of the lord of the demesne lands, it was called a "seignory in gross."

A public right of way, or highway, is constituted by dedication (actual or presumed) by the owner of the land over which the way passes. The use for a long period of a road as a public road is evidence from which a dedication of the road to the public by the owner, whoever he was, may be presumed. Where the evidence extends to the whole period of living memory, the presumption is not rebutted by showing that the land has been in the occupation of another under a lease for the whole time; for the dedication may be presumed to have been made by some owner before the commencement of the lease.

No formality is required to render the dedication of a highway effective. All that is necessary is that a person capable of dedicating the way, should, with the intention of dedicating it, allow the public to pass along it, and that the public should thereupon make use of it as a highway.

Apart from the presumption arising from user from the whole period of living memory, a leaseholder cannot dedicate a highway so as to bind the reversioner. A tenant for life, without the aid of special powers, by statute or otherwise, is in this respect in the same position as a leaseholder. But by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 16), a tenant for life may, in connection with a sale or grant for building purposes, cause any part of the settled land to be laid out for roads, paths, etc., for the use of the public.

Highways may also be, and frequently are, created by or under powers of statutes, such as Inclosure Acts.

Although, under ordinary circumstances, a public highway must lead from one public place to another—and this in Scotland has been regarded as essential to the proof of a right of way—it has been established as law, in England, that there may be a public highway in a *cul de sac*, or in a place which is not a thoroughfare. No evidence of user, however, can establish a public right to stray or wander at large over a piece of land, although, as on a village green,

there may be a right by custom for the *inhabitants of the village or parish* to use the land for the purposes of recreation, etc. While there cannot exist in the public generally a right of stray or recreation paramount to the right of the owner of the land, it is, of course, possible that the land may be vested in certain owners subject to a trust to permit the public, under suitable regulations, to use the land for recreation, etc. This is the case where, under the powers of Inclosures Acts, land is allotted to certain persons for these purposes. By sect. 25 of the Commons Act, 1876 (39 & 40 Vict. c. 56), every allotment made, after the passing of that Act, for the purpose of a recreation ground, is vested in the churchwardens and overseers (*a*) for the time being of the parish. By special Acts of Parliament or by trust deeds, land is sometimes vested in conservators or other persons in trust for similar purposes. In many royal and other parks the public, conducting themselves properly, are practically assured in the enjoyment; but without any right capable of being legally asserted against the owners of the ground.

The owner of land may dedicate a way through it to the public, reserving the right from time to time to plough up the land; and if, from the time of living memory, the public have enjoyed a footpath through a field, and the occupiers have from time to time ploughed up the field without lifting the plough over the footpath, this is sufficient evidence of a dedication subject to the above condition.

The dedication of a highway to the public does not limit the rights of the owner of the land further than to permit the use by the public for the purpose of a highway; and any person being on the ground, not for the purpose of using it as a highway but for some other purpose, is a trespasser. So where a person came upon a highway, not for the purpose of using it as such, but for the purpose of interfering with the owner's right of sporting, he was treated

(*a*) These, for this purpose, are now replaced by the parish council under the Local Government Act, 1894 (56 & 57 Vict. c. 73).

as a mere trespasser: *Harrison v. Duke of Rutland*, 1893, 1 Q. B. 142; 62 L. J. Q. B. 117 (12 R. C. 582).

Where there is, adjoining to or on an ancient way, a dangerous excavation or obstruction not shown to be of recent origin, the presumption is that the way has been dedicated to the public, and accepted by the public, subject to the danger or inconvenience; and, in such case, a wayfarer who encounters the danger and suffers damage in consequence has no right of action.

When once a public right of way has been constituted, the right can only be extinguished by statutory authority. It is a maxim of English law, "Once a highway, always a highway." Long disuse does not in law extinguish the right, though doubtless it will render the proof of the right more difficult, and may tend to suggest a doubt whether such former user as may be proved was exercised "as of right."

General statutory enactments empowering the stopping up or division of highways are contained in the Highway Act, 1835 (5 & 6 Will. IV. c. 50, ss. 84-93), extended by 25 & 26 Vict. c. 61, s. 44). By the Local Government Act, 1894 (56 & 57 Vict. c. 73, ss. 13, 19), the consent of the parish council or meeting, as the case may be, and of the district council, is rendered necessary for the stopping up or diversion of a public right of way in a rural parish, and a parish meeting may (before confirmation at a second meeting of the parish council) veto the consent given by the parish council.

The Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20, ss. 46, 49-66), contains provisions under which, subject to the special Act, a highway crossed by a railway is to be carried over or under the railway by a bridge of which certain dimensions are specified according to the nature of the highway. The provisions as to a bridge have been held inapplicable to footways, but the Act provides for the making of approaches, etc., where the railway crosses a footway. Unless the special Act makes a more convenient provision, the public must submit to the risk involved in crossing the

railway at a level, and of ascending an embankment or descending into a cutting, as the case may be. *Reg. v. Bexley Heath Railway Co.* (C. A.), 1896, 2 Q. B. 74; 65 L. J. Q. B. 469.

A highway is extinguished where the way is physically destroyed by natural causes, such as encroachment by the sea, or a landslip such as to entirely close the passage.

Where, under an Act of Parliament, a road or street is "vested" in a local authority, that does not confer upon the local authority the right in all above and below, which would belong to the proprietor of the soil; but only a limited right, including the surface and so much above and below the surface as is necessary for the ordinary purposes of a road or street.

By the common law the inhabitants of a parish are bound to keep in repair the highways lying within the parish, and are liable to indictment for non-repair, unless they can show that the burden is cast upon some other persons. Similarly, the repair of public bridges is *primâ facie* the duty of the inhabitants of the county. And this liability, as affirmed and defined by the Statute of Bridges (22 Hen. VIII. c. 5, s. 9), extends not only to the bridge itself, but also to the road over the bridge and to the roads approaching the bridge for a distance of three hundred feet from each end. By the Highway Act, 1835 (5 & 6 Will. IV. c. 50, s. 21), where a bridge has been built after that Act, and is repairable by the county or part of a county, the highways passing over and leading to the bridge are repairable by the parish, person, or body liable to repair "the said highway" before the bridge was built. By the Local Government Act, 1888 (51 & 52 Vict. c. 41, ss. 3, 34, 79), bridges repairable by the county (except those in county boroughs) are under the charge of the county council; and those in county boroughs are under the charge of the council of the borough; and, in regard to such bridges, the county council or the corporation of the borough, as the case may be, appears to have succeeded to the liabilities of the inhabitants of the county. Other bridges in a borough are under the charge

of the council of the borough by virtue of the Municipal Corporations Act, 1882 (a).

The *primâ facie* liability of the parish for the repair of highways has likewise been modified by statutory law, which is extremely complex. But, where the highway has fallen into disrepair and no statutory remedy is available, it seems that the common-law remedy, by indictment of the inhabitants of the parish, is still competent.

There may also be a liability *ratione tenuræ* of the owner and occupier of a tenement whereon is a highway or bridge, to repair the highway or bridge; and such liability may be proved by evidence of long usage, giving rise to the presumption that the liability existed from time immemorial. Such liability is also conclusively proved by a conviction (upon indictment) of a former tenant with whom the person charged is in privity of estate. In many cases a liability of this kind has been extinguished or modified under various statutes relating to highways.

An ancient custom or right, in the nature of a public right of way, as well as, to a certain extent, of a public right to a profit out of the soil, has been confirmed by statute in favour of the inhabitants of Devon and Cornwall. By this Act (7 James I. c. 18), upon a recital that the sea-sand has been found very profitable and much used by the inhabitants of those counties for that purpose, and that divers persons having lands adjoining to the sea-coasts have interfered with those who have been used to fetch the sea-sand by demanding an arbitrary compensation, enacts "that it shall and may be lawful to and for all persons whatsoever residing and dwelling within the said counties of Devon and Cornwall, to fetch and take sea-sand at all places under the full sea-mark, where the same is or shall be cast by the sea, for the bettering of their land and for the increase of corn and tillage, at their will and pleasure." This Act is continued and made perpetual by the subsequent Acts 3 Car. I.

(a) For a more particular analysis of the tangle of legislation relating to this subject, see notes to Nos. 14-16 of "Highway," 12 Ruling Cases, p. 680, *et seq.*

c. 4, and 16 Car. I. c. 4. The right of user of the ways anciently employed by the inland inhabitants for bringing up the sea-sand is thus clearly established.

CHAPTER XVII.

THE FEUDAL SYSTEM, AND THE ORIGIN OF TENURE.

ALTHOUGH the introduction into England of feudal tenures was comparatively late, and most of the characters of these tenures have disappeared from English law, it is necessary, in order to understand English real property law, to describe generally the features of a system which long dominated the land laws of a great part of Europe, and has still left its mark upon the laws relating to land where not recast under the influence of revolution and the Code Napoleon. For this purpose I cannot improve upon the statement already given in the Student Edition of Austin's Jurisprudence (at p. 416) (a), condensed from the editor's note on Lecture 52 in the larger edition.

"Amongst those innumerable semi-independent communities which existed in Northern Europe from the time of the virtual dissolution of the Roman Empire, it was not uncommon for the several sovereigns or those having more or less power over those several communities to become mutually bound by engagements, of which the details might vary indefinitely, but of which the leading features were of the following character. A prince who had reduced a province or district to temporary obedience by force of arms, would find it convenient to give the possession to another, who, by reason of his having the inhabitants of the conquered district, or their immediate neighbours, already in the *habit* of obedience to him, was capable of exerting and enforcing a permanent authority. The latter would acknowledge that he held the territory as a loan in trust, and promise fidelity and allegiance. Thus the Saxon Chronicle relates

(a) Here extracted, with permission of Mr. John Murray, the proprietor of the copyright and publisher of the work.—R. C.

(in the year 945) that 'this year K. Edmund overran all Cumberland, and let it all to Malcolm, King of the Scots, on the condition that he became his ally both by sea and land,' a magnificent loan (of a province extending from the Tyne to the Forth), made in consideration of an indefinite promise of assistance, in which doubtless originated the celebrated claim of feudal superiority of which so much was heard two and a half centuries later. Nor were relations of this kind peculiar to the Middle Ages of Europe. Something of the kind is apt to occur wherever the elements of political society are in a state of transition and imperfect fusion. The *Ghatwallee* chiefs among the hill-tribes of India, for instance, previously to the settlement of those regions under British authority, held their lands of the *Huzoor* (or Government) on condition of guarding the passes and generally of performing services the nature of which has afforded much scope for controversy, and which were probably never capable of accurate definition. The indefinite relation I have been attempting to indicate between the acknowledged superior potentate and the person who received such possession at his hands, and who promised fidelity, seems to have been marked in the north of Italy and the adjacent countries by the word *fio* or *feu*, a word which in the beginning of the eleventh century, or possibly still earlier, made its appearance in legal documents, latinised into *feudum*.

"The formulation into written documents of the indefinite relations above described, marks a critical stage in the history of the relations themselves: and the form of the document had doubtless an important influence upon the character of the tenure. The documents of this nature which are preserved to us from the eighth and ninth centuries, relate chiefly to tenures at the hands of ecclesiastical persons, and are modelled on the *precarium*, a tenancy revocable (in name at least) at the will of the grantor, and ceasing at the death of the grantee. The grant was made upon the petition of the tenant, and gave him *possession* at the will (in name at least) of the grantor, and availing against all except the

grantor. But it had the inconvenience (if it was wished to continue the right beyond the lifetime of the immediate tenant) that it imparted to his heir not even the right of possession.

"A device was however invented, probably by Longobard lawyers, about the end of the tenth century, of engrafting upon the *precarium* the terms of the *emphyteusis*; a device by which the right of possession was conferred upon the heirs of the grantee, and scope was found for inserting various express conditions. For this purpose the *emphyteusis* was conveniently elastic. 'Talis contractus quia inter veteres dubitabatur, et a quibusdam locatio, a quibusdam venditio existimabatur, lex Zenoniana lata est, quæ emphyteuseos contractus propriam statuit naturam, neque ad locationem neque ad venditionem inclinantem, sed *suis pactionibus* fulciendam' (Inst. iii. 24, § 3). Into this composite document accordingly were commonly incorporated the various customary obligations already known under the name of *fio* or *feu*, and the tenure so created became known as *feudum*. Gradually the form of the *precarium* was dropped, and *emphyteusis* remained the model, as to legal form of tenure.

"A remarkable example belonging to the transition period is the following. In a notable charter of the year 1033, printed in Muratori's collection (*a*), and the draft of which was apparently settled by two lawyers, one learned in the laws of the Longobards, and the other in the Roman civil law, certain lands are conveyed '*habendum precaria atque enfiothecaria nomine* [sc. *tenurâ*],' thus combining the *precarium*, the *emphyteusis*, and the *fio*.

"The tenures so created by the great potentates were copied by the smaller lords in their grants to their vassals, and within a century from the time when the *emphyteusis* was launched on its new career, a *system* of feudal tenures had been elaborated, incorporating and formulating the floating usages of that rude period. The chains forged by custom were riveted by contract and law."

(*a*) *Antiq. Med. Aevi*, vol. i. p. 15.

Although tenures, having some of the features above described, existed in England before the Norman Conquest, it is certainly not until after that period that feudal tenures, in their matured form, were general in England. However this may be, it is undoubted that, within little more than a century from the time of the Norman Invasion, the feudal system was well established, not only throughout England, but also throughout the mainland (*a*) of Scotland, where the law relating to land is still dominated by the forms of feudal conveyancing.

In effect "it became," as Blackstone observes, "a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, 'that the King is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him to be held upon feudal services.'" Consistently with this theory many oppressive practices became prevalent; and the consequent dissatisfaction led to the insertion in Magna Charta of restraints upon some of the more grievous practices. The creation, in England, of new subordinate tenures was prohibited by the statute "*Quia Emptores*," 18 Ed. I.

The great change, however, took place in the time of the Commonwealth, when most of the inconvenient incidents of the feudal tenures were swept away. Their abolition was confirmed in the year of the Restoration by the Act 12 Car. II. c. 24. By this Act the tenure by knights-service, which had become a peculiarly burdensome one, was declared to be totally abolished, and the more burdensome of the general incidents of tenures, such as wardships, value and forfeiture of marriage, etc., were expressly discharged; and all tenures of any honours, manors, lands, tenements, or hereditaments, or any estate of inheritance at the common law, held either of the King, or of any other person or persons, were turned into free and common socage,

(*a*) The feudal system has never extended to Orkney and Shetland where lands are still held by udal (*i.e.* allodial) right.

as from the 24th of February, 1645. The tenure in socage was the least burdensome of all the tenures known at this date, and probably implied little more than the ancient obligations of the free tenants to the lord of a manor who had a Court where the tenants were bound to attend and submit their disputes. Even of this tenure some of the uncertain incidents were by the same Act discharged. The substantial obligations which remained in the case of a subordinate tenant were the rent (if any), commonly called a quit-rent (which must have been fixed before the statute 18 Ed. I., and therefore is now of comparatively small account), doubled on the death of a tenant, and the escheat or forfeiture to the mesne lord, upon the conviction of the tenant for felony, or upon his decease intestate without an heir. Forfeiture for felony is now abolished by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23). It seems that the superior may still exact the oath of fealty to be taken in his Court if he has one. The only importance of this in recent times has been to ascertain the persons constituting the "homage" whose consent was necessary to an approvement (or enclosure) of waste of a manor under the Statute of Merton. But this importance is minimised by the Law of Commons Amendment Act, 1893, already referred to (at p. 103, *supra*).

Tenure in Frank Almoign was expressly excepted (by sect. 7) from the operation of the Act 12 Charles II. c. 24.

Tenure in frankalmoign (in liberâ eleemosynâ, or free alms) is that whereby a religious corporation, aggregate or sole, holds lands of the donor to them and their successors for ever. The services for which these were held may be regarded as obsolete (*a*). Such corporations as still hold land acquired under this tenure, are, of course, bound to use the land according to the corporate purposes.

Copyhold tenures were also (by the same section) excepted from the operation of the Act 12 Charles II.; and this is consistent with the general purpose of that Act, which

(*a*) The usual service was perpetual prayer for the soul of the grantor. Since the Act of Uniformity, there can have been no legal obligation to perform such a service.

was to destroy the mushroom growth of feudalism. Copyhold tenancy belongs to the manor, which has a history of its own, quite distinct from the feudal tenures.

CHAPTER XVIII.

THE MANOR AND THE VILLAGE COMMUNITY.

SIDE by side with the system of feudal tenures, though at one time more or less blended with that system, existed the manor. Manors comprised much of the soil of England long before the feudal tenures introduced by the Normans; and the manor and its customs, while subordinated to the conditions of the superimposed feudal charters, still continued to subsist; and some of their distinguishing marks have survived the characters peculiar to the strictly feudal tenure. The most important feature of this survival consists in what is called copyhold tenure. The English copyhold tenant still holds in name, as in the thirteenth and fourteenth centuries he did in fact, "at the will of the lord." But this expression has been interpreted by custom as admitting of a fixity of tenure. In manors "in ancient demesne," that is to say those which were in the hands of the King in the time of Edward the Confessor, copyhold lands are said to be held not "at the will of the lord" but "according to the custom of the manor." And, in the fifteenth century, the usual description of the copyhold holding is "by the will of the lord and the custom of the manor."

Copyhold tenure has been rendered comparatively unimportant by the powers of enfranchisement now contained in the Copyhold Act, 1894 (57 & 58 Vict. c. 46, consolidating and amending earlier Acts).

Still older probably than the manor is the village community, which in England, at some period which it is difficult to determine, came under the power of a lord, while the village customs survive in the so-called "customs of the manor."

The constitution and customs of the village community have formed a subject of research by writers who have

invested the topic with a fascinating interest. The works most accessible to English readers are those of Seebohm (*a*), Maine (*b*), Vinogradoff (*c*), Maitland (*d*). There are also the German works of G. F. Maurer, Haussen, and Nasse, referred to in Vinogradoff's introduction (*Villainage*, at p. 26).

The student of English law is now little concerned with the question which has been much discussed by some of these writers, namely, whether the tenants, who in the thirteenth and fourteenth centuries were mostly held in a servile condition, had at an earlier period belonged to a free village community. The history of proprietary interest is little affected by any such question. The enjoyment of possession, amounting, in effect, to property so far as relates to all except the master or lord, is quite consistent with a servile condition. And where, as in England, the servile condition has become extinct, such a possession (unless so far as modified by contract with the lord) naturally became a right of property in the full sense of the word.

But whether or not the early existence of a free village community in England can be proved, the agricultural customs of the village community coming down from a very early period are still traceable in the parcels of land held, and in the standards of land measurement (*e*) used in England at the present time. These village customs belong to a type which has left traces over a wide region, including much of the continent of Europe and of India (*f*). They are intimately associated with the use by the villagers of a common system of tillage, and are adapted to secure

(*a*) *English Village Community*, 3rd edit., 1884.

(*b*) *Village Communities*, 1876.

(*c*) *Villainage in England*, 1892; *The Growth of the Manor*, 1905.

(*d*) *Domesday Book and beyond*, 1897.

(*e*) Thus the furlong (220 yards), the normal *length of the furrow*; the chain (22 yards), measuring the breadth of the acre (22×220 yards), and conveniently used as a measure of the cricket pitch; the rod of $5\frac{1}{2}$ yards, measuring the breadth of the rood or quarter of the acre, and of the number of furrows proportionate to a day's work of a yoke of oxen, etc.

(*f*) Maine, *passim*. There are still extant in the north-west of India, grants (or *sunnuds*) by the paramount lord to the head of a village community, authorising him to colonise a tract of waste land, much after the fashion of the Homeric tradition below referred to.

proportionate benefits to the cultivators. One characteristic feature is that arable land came to be divided by parcels of furrows distributed over various portions of the common fields; and the untilled land, as well as the aftermath of the land under tillage, remained for pasturing the beasts of the plough. In brief, the system is that broadly referred to in the well-known passage of the *Germania* of Tacitus—

“*Arva per annos mutant et superest ager*,”

and perhaps in the Homeric tradition of the settlement of the colony of Pheacians led by Nausithous, who, it is said—

ἐδάσσατ' ἀπόλκας (a).

The passage of Tacitus, as Seebohm points out (3rd edit., at p. 369), describes the agriculture of a pastoral people, with a large range of pasture land for their cattle, a small portion of which, annually selected for tillage, sufficed for their corn crops. And the Homeric tradition seems to point to a distribution arising out of an original joint property in the land available for tillage, and a continuance of the joint property in the pasturage for the beasts of the plough (b).

It has been observed that, in Scotland, the law relating to land is still dominated by the forms of feudal conveyancing. The difference is owing, partly to the absence of any statute affecting Scotland corresponding with the statute of *Quia Emptores*, and partly to the circumstance that the substantial incidents of feudal tenures were not interfered with by the legislation embodied in the Act 12 Charles II. c. 24, but subsisted in full force until after the risings of 1715 and 1745, when most of them were swept away by the statutes of 1 Geo. I. c. 54, and 20 Geo. II. c. 50.

There is now no trace in Scotch law of anything corresponding to the copyholds of English law. Although the Scotch barony, like the English manor, must at one time

(a) Od. vi. 6.

(b) Seebohm's theory as to the origin of the scattered strips is criticised by Maitland (*Domesday Book*, etc., p. 337, *et seq.*), who shows that the ownership of the strips had become fixed in *sic* before Domesday.

have comprised a class of villains, or servile tenants, they were probably, at a much earlier period than in England, virtually emancipated in the course of the wars and faction fights in which all classes of persons were required for military service. On this point it is interesting to compare the arguments used in the cases discussed in the eighteenth century (1757-1775), in the Scotch and English Courts respectively, upon the condition of a negro slave brought to this country (*a*). The Scotch Court, as well as the English Court, decided that the *status* of negro slavery cannot be recognised or given effect to in this country. But, while from the arguments in the English case it appeared that the *status* of villainage in England had not finally disappeared until the reign of Queen Elizabeth, it is (by the written memorials or arguments in the Scotch case) virtually admitted that the *status* of villainage, if it ever existed in Scotland, did not survive beyond the fourteenth century.

The absence of anything in Scotland corresponding to the English copyhold tenure is probably due to the circumstance that persons who acquired any permanent interest in land obtained feudal grants or leases; and that Scotch law has never admitted the force of custom to convert a tenancy at will into a tenancy of a permanent character.

CHAPTER XIX.

OF FREEHOLD ESTATES IN LANDS, TENEMENTS, AND HEREDITAMENTS.

THE word "estate" is commonly used to express the extent in respect of time of the right and interest which a man may have in lands, tenements, and hereditaments.

Freehold estates, considered from the historical point of view, are distinguished as—

(*a*) See the case of *James Sommersett*, a Negro, K. B. 12 Geo. III., 1771, 20 St. Tr. 1; and the Scotch cases of *Sheddan v. Sheddan*, A. D. 1756, and *Knight v. Wedderburn*, 1775, stated in the notes; also reported in Morrison's Dict. of Decisions, voce "Slave," vol. 33, pp. 14, 545, *et seq.*

First, estates at common law, as they existed before the Statute of Uses.

Secondly, estates at law as created under the Statute of Uses.

And, *thirdly*, estates in equity, such as the right of the beneficiary under a trust, where the paramount legal title is vested in the trustee.

And *first*, of the estates at common law, as they existed before the Statute of Uses.

These again should be considered having regard to the modifications introduced by the statute *de donis*, and also with regard to the statute *Quia Emptores*, already referred to. For clearness in this description of estate it is important to keep in mind these dates—

A.D. 1285.—Stat. Westminster 2, 13 Edw. I. (*De donis Conditionalibus*).

A.D. 1290.—Stat. 18 Edw. I. c. 1 (*Quia Emptores*).

A.D. 1472.—12 Edw. IV. (*Taltarum's case*, the case commonly referred to as establishing the principle that a good title to the fee is obtained by a common recovery).

A.D. 1535.—27 Hen. VIII. c. 10 (Statute of Uses).

The word “estate” as applied to estates at common law, before the Statute of Uses, is strictly applicable only to an estate of freehold, which was considered to be the least estate which could be held by a free man as such.

A freehold estate may be either—

- (1) an estate in fee (or fee simple), being the largest estate in point of time which a man can have in the land or tenement; or
- (2) a conditional fee, which, after the statute *de donis*, became known as a fee-tail, or estate tail; or
- (3) a life estate, *i.e.* an estate to endure for the life of the tenant or of some other person.

Although the classification of freehold estates in the last-mentioned threefold division is especially appropriate to estates as they existed at common law before the Statute of Uses, and is also (subject to the change of character of

the conditional fee above referred to) appropriate to estates at common law as they existed before the statute *de donis*, the same division applies to freehold estates as they existed after these statutes, and as they still exist. It is convenient, therefore, to describe the characters of these three classes of estates, as they now exist, only noting, where necessary, how these characters have been affected by the leading statutory enactments above specified, as well as by more modern enactments to be referred to in the proper places.

(1) As to an estate in fee.

To create an estate in fee in A., the intention must be expressed that the estate is given to, or is to be held (*habendum*) by, A. *and his heirs*.

Here it is necessary to remark, once for all, that the expression "heir," according to its primary meaning in English law, implies that the person so described derives any right he may have only through the *præpositus* (A.), and is bound by all deeds and obligations made or incurred by A. And the expression "heirs," when used generally, describes an indefinite series of such persons, all of whom derive any right they may have through A., and are bound by his deeds and obligations.

Consequently an estate to be held by "A. and his heirs" implies a right extending (speaking generally) to a perpetuity, and capable of being alienated or disposed of by A. without question by any person claiming in the character of his heir. The power of alienation, as against the heirs, appears to have been fully established at least so early as the reign of Henry III.

According to the interpretation uniformly applied to deeds in English law, in order to create a perpetual estate in A., the words "and his heirs" must be expressed. Otherwise the interpretation is that the estate is to be held by A. for his life only. By Scotch law the rule of interpretation in a deed is different. Where lands are disposed to A., the intention is presumed that the tenure is transmissible to the heirs, and A. is entitled to, and capable of disposing of, the fee in perpetuity. The interpretation of a will in

English law is elastic, and the intention to give the fee may be inferred from other expressions. Now, under the Wills Act (1 Vict. c. 26, s. 28), a gift of land to A., in absence of context showing a different intention, is sufficient to carry the fee.

It is to be remembered that so long as the obligations between the feudal tenant and the lord of the fee remained substantial, the complete power of alienation by the tenant must have been subject to some control, or at least to some claim to interfere, on the part of the lord. It is obvious from the course of legislation on this subject, that the claims of the lord were continually evaded in practice. It is enacted in Magna Charta that for the future no freeman should give or sell any more of his land than so that he should be able out of the residue of his land to perform the services due to his lord pertaining to his fee. This enactment apparently had little effect on the practice of subinfeudation, whereby, although the services to the superior lord always remained nominally a charge on the estate, the difficulties of recovering them must have been much increased. The growth of the practice is stated in the preamble to the Statute of Westminster the Third (18 Ed. I. Stat. I., A.D. 1290), being the celebrated statute known from the opening words as "*Quia Emptores*." The preamble may be freely rendered as follows:—

"Whereas purchasers of lands and tenements held in fee of great men and other lords, have oftentimes to the prejudice of these lords, entered into the fees, upon purchase from the tenants of those lands and tenements to be held by the purchasers and their heirs in fee of their vendors (*de feoffatoribus suis*), and not of the chief lords, whereby those chief lords have frequently lost their Escheats, Marriages, and Wardships of lands and tenements belonging to their fees: which to these great men and other lords has appeared grievous, amounting in effect to deprivation of their inheritance":—

It was accordingly enacted, "That from henceforth it shall be lawful for every freeman at his pleasure to sell his

land or tenement or part thereof; but only so that the purchaser who is infeft (*feoffatus*) hold the land or tenement of the chief lord by the same services or customs by which the vendor (*feoffor*) previously held the same."

It will be observed that the alienations contemplated by this Act are those of the entire fee, and that the Act does not contemplate any change upon the law relating to estates tail, which, at the time of this enactment, were no doubt supposed to be effectively guarded from alienation by the statute *de donis*, as will presently appear.

It may be convenient here to explain the distinction, which has important effects in English law, between "purchase" and "descent" as the mode of acquiring title to an estate. A person acquiring title by devolution of law, *i.e.* merely in the character of "heir" to the preceding owner, is said to take by "descent." A person acquiring title in any other way is said to take by "purchase." In this sense the word "purchase" is used by Shakespeare in the speech of the dying King Henry IV. to his son (*Hen. IV.*, part ii.) :—

" what in me was *purchased*,
Falls upon thee in a more fairer sort;
So thou the garland wear'st successively." (a)

Whether Shakespeare, as Lord Campbell suggests, used the word "purchased" from a recollection of a smattering of law learned in his youth, or whether the word "purchase" in this sense was at the time good popular English, the meaning is exactly the technical legal meaning of "purchase" at the present day, *i.e.* acquisition otherwise than by inheritance strictly so called. It will be seen hereafter that the puzzles relating to "descent" and "purchase" have frequently arisen from an ambiguity in the use of the word "heir," etc., in loosely drawn wills or other settlements.

There will be found in the authorities upon estates at common law, much discussion as to the effect of a fee expressed to be made determinable upon a condition subsequent.

(a) *Hen. IV.*, act iv. scene 5.

By a condition subsequent is here meant an event which, at the time of the creation of the estate, is contemplated as one which may happen, or which may never happen. The estate is said to be vested immediately by the act or deed creating the estate, and to be divested if and when the event happens. The condition determining a fee simple cannot be an event which must happen sooner or later, such as the death of a certain person. For the estate created on such a condition would not be a fee. If the original words of gift clearly created a fee simple, the condition would be repugnant and void; or, if the gift was something less than the fee simple, the reversion or remainder (if there could be one) at common law, must, from the outset, be vested in a certain person.

It is at least clear that, at common law, the possibility of reverter could be effectually reserved in a grant by the King, and there seems no reason why, before the statute *Quia Emptores*, such a possibility should not equally be reserved by the deed of a subject.

The following example of a Royal grant has been cited by Challis (2nd ed. at p. 228) on the authority of a note by Lord Hale on Coke on Littleton, 27a :—

The terms of the grant are cited in Lord Hale's note (correctly) as follows :—

“King Henry the Third ‘*dedit manerium de Penreth et Sourby Alexandro regi Scotiæ et hæredibus suis regibus Scotiæ.*’”

There follows, in Lord Hale's note, a curiously blundered version of the facts (a); but he states correctly the result, namely, that “King Ed. I. recovered seisin and the coheirs of Alexander were excluded.”

Notwithstanding the misapprehension of facts in Lord Hale's note, the case is a good illustration of the point that the common law of England allows a determinable fee to be created by a Royal grant.

If a subject should have enfeoffed another (A.) *habendum* to A. and his heirs for a period determinable upon an uncertain event, the estate of A. would still be a fee; and, if

(a) See note at the end of this part (p. 326).

such a feoffment was made after the statute *Quia Emptores*, the feoffee must hold of the lord of the fee and not of the feoffor, and any possibility of reverter would enure to the lord. There consequently no longer existed any motive for creating an estate in this form, and such estates must have become, before the Statute of Uses, obsolete in practice. At all events, since the Statute of Uses, the effect, if desired, could be more certainly carried out by a shifting use under the provisions of that statute. Such is the name and arms clause not unfrequently in use at the present day.

(2) Of a conditional fee (*a*), which, having regard to the effect of the statute *de donis*, became known as a fee-tail, the general type is where land is given or conveyed to be held by "A. and the heirs of his body." Another type (special tail) is where the land is to be held by "A. and the heirs of his body by his wife B.," etc.

The effect of such a gift, at common law, was as follows:—

If at the time of the gift A. had no issue, then A. had merely an estate for life, capable of being enlarged into a fee as soon as he had issue born to him. That is to say, the existence of issue was a condition precedent for the enlargement of the estate. As soon as he had issue coming within the condition, he became capable of disposing of the whole fee. And similarly the issue who inherited could alienate the fee after his death. But if the donee died without having disposed of the estate, and the issue also failed without the power of alienation having been exercised, the estate reverted to the donor according to the form of the original gift.

The statute *de donis conditionalibus* (1285, 13 Ed. I.) gave a new effect to an estate which was to be held by "A. and the heirs of his body," or to "A. and his wife and the heirs procreated of their bodies," etc., with a reversion to the donor and his heirs. It was, by this statute, enacted in effect that "the will of the donor, according to the form in the deed of gift manifestly expressed, shall from henceforth be observed, so that they to whom the tenement was

(a) See division of freehold estates, at p. 123, *ante*.

so given, under conditions shall have no power to alienate the tenement so given, but that it shall remain to the issue of them to whom the tenement was so given after their death, or revert to the donor or to his heir if issue fail (whether there be no issue at all, or if there have been issue and such issue fail by death and failure of heirs of the like character)." The statute also prescribed a form of writ for the recovery of the land by the heir according to the form of the gift, similar to the writ (called a formedon) already used by the donor or his heirs to recover the reversion on failure of issue of the donee in a case where the power of alienation had never arisen, or had not been exercised.

The statute *de donis* was doubtless intended by its promoters, the great landowners, to enable them to put their estates outside the power of alienation. For this purpose the terms of the statute were drawn up with considerable skill. But it would have been surprising if the astuteness of conveyancers and judges combined could not have found a loophole in an enactment framed for a purpose so subversive of the common law of England.

That the attempt might be made to evade the statute by the proceeding known as a *fine* seems to have been anticipated by the framers of the statute. For it was enacted (in the end of the statute) that, "If a fine be levied hereafter upon such lands, it shall be void in the law; neither shall the heirs, or such as the reversion belongeth unto, though they be of full age within England, and out of prison, need to make their claim."

A *fine* was a proceeding purporting to be a judgment submitted to by the parties, by way of compromise, so as to put an *end* to the suit. If it were not for the express provision of the statute *do donis* above cited, it would of course have been easy to use a fine levied in a suit by A. to bar any claim *by the heirs of his body*. For although the statute declared that, notwithstanding alienation by the tenant in tail, the tenement should after his death remain to his issue, such issue were still persons entitled in expectancy in the character of heirs, and, by reason of their

C.

K

privity of estate, would be bound, or estopped, by the judgment or sentence of a competent Court in a legal proceeding to which the tenant in tail was a party.

Fines, speaking generally, became the subject of various statutory enactments, and particularly of an Act 4 Hen. VII. c. 24 (A.D. 1490), whereby it was enacted that a fine, levied with proclamation as therein prescribed, should conclude "as well privies as strangers." This general enactment was interpreted by a majority of judges in the year 1536 (19 Hen. VIII.) so as to override the express provisions of the statute *de donis*. And they decided that, by a fine levied with proclamation under the statute by a tenant in tail, the issue in tail were immediately and finally barred, nor were allowed any time to prosecute their claim upon the death of the tenant in tail by whom the fine was levied (*Case of Fines*, Dyer 2b, pl. 1; Challis at p. 278, 2nd edit.). This decision was, in effect, confirmed by the statute 32 Hen. VIII. c. 36 (A.D. 1540); and the result was that where the tenant in tail levied a fine (with proclamations) and conveyed his estate away, the purchaser acquired what is called a base fee, that is to say, an estate to him and his heirs so long as there were living any issue inheritable under the entail.

To break the fetters so as to exclude the persons entitled in reversion or remainder, expectant on the failure of issue inheritable under the entail, was accomplished by a more complex proceeding, called a recovery.

Suppose T. is the tenant in tail in possession.

D., on the allegation of a title as stranger to the entail, brings an action as demandant (or plaintiff) against T., as defendant, to recover the land.

T. admits D.'s right, but asks leave to bring in a third party, V. (as "vouchee"), alleging that V. has warranted the title under which T. holds as tenant in tail, and calls on him to defend the title.

V. admits the warranty and makes default in again appearing to defend the title.

Judgment is then given that D. shall recover the land,

and that T. shall recover from V. lands of equal value. The result is that D. is entitled to hold and convey the lands in fee simple; and that the succession under the entail is presumed to apply to the lands of equal value for which T. holds judgment.

The validity of these proceedings to give a good title to the fee, is established, according to the traditions of the bench and bar, by the case called *Taltarum's case*, of which the only report now accessible purporting to give the opinions of the judges is that of the Year Book 12 Ed. IV. Mich. T.

The judgments, as reported in the Year Book, are not explicit upon the point which they are assumed to have decided; but if the pleadings are examined it becomes clear that the point was so decided.

The report has been compared by Mr. Maitland with the record on the De Banco Roll for Mich. 12 Ed. IV., and he finds that the pleadings are, in the main, correctly stated in the Year Book report (a).

Taltarum's case, as it stands on the pleadings down to the reply, and irrespective of the matter contained in the rejoinder, was as follows:—

The action was brought on the statute of 5 Richard II. c. 7, against forcible entry, and the plaintiff sued “tam pro domino Rege quam pro seipso.”

J. Trevistarum, who was seised in fee, had given the land to W. S. *habendum*, to him and the heirs of his body. W. S. entered and had issue, H. the elder, and R. the younger, and died. Upon the death of W. S., H. entered, and was seised by form of the gift.

While H. was so seised, one Taltarum had sued by writ of right against H. The parties appeared. H. vouched to warranty one K., who was present and confessed the warranty. Taltarum imparled and returned. The vouchee (K.) did not

(a) See Law Quarterly Review, vol. ix. p. 1. It appears from the record that the name of the demandant in the recovery proceedings referred to in the pleadings was Talkarum, or Talcarum. It is, however, convenient to use the traditional name of *Taltarum's case*.

return, and was treated as in contempt. Final judgment was then given in favour of Taltarum against H., and for H. against K. upon the warranty.

The plaintiff in the action founded his title upon a feoffment made to him by Taltarum, upon which he had entered, and was seised at the time of the alleged entry made by the defendant. The defendant deduced his title under the entail as follows: The above-mentioned H. dying without issue, was succeeded by R. (the younger son of W. S.); and on R.'s death the defendant (son to R. and heir of the body of W. S.) became entitled and entered (as he alleged) lawfully.

The reply, which stated the proceedings upon the writ of right, was demurred to.

So standing the pleadings, the issue was distinctly raised, whether a good title to the fee was made by the proceedings upon Taltarum's writ of right, which were, in effect, the proceedings used subsequently in a common recovery with simple voucher.

Although, as already stated, the opinions of the judges as reported in the Year Book are not explicit upon the point (*a*), they must have decided in favour of the validity of the proceedings upon the writ of right to bar any claim under an entail, where the person seised as tenant in possession under the entail had been defendant, and the demandant had recovered upon a judgment in the form stated. Otherwise it would have been unnecessary to consider the matter stated in the rejoinder as after mentioned. That the judges did so decide is also clear from the uniform tradition of the Bench and Bar, as stated by Coke in *Sir A. Mildmay's case*, 6 Co. Rep. 40*a*.

The opinions of the judges, as reported in the Year Book, are chiefly directed to the matter contained in the rejoinder, which was to the following effect: That before the issuing of the writ of right, H. had enfeoffed one Tregos in fee, and

(*a*) It is hinted in some of the text-books that they avoided a too explicit statement upon the point in order that the effect of their decision might not be foiled by some new Act of the Legislature.

Tregos had made a gift of the tenement *habendum* to H. and his wife Jane and the issue begotten of their marriage, remainder to the right heirs of the said H. That Jane died without there having been any issue of the marriage, and that after her death, and while H. remained in sole possession and seisin of the tenement, the writ of right was brought by Taltarum, on which proceedings followed as above. That Taltarum never entered in the lifetime of H., and that H. had neither at the time the writ of right was issued, nor since, any estate other than as tenant in special tail under the gift by Tregos.

This the judges considered a sufficient answer to the reply, chiefly, as it appears, on the ground that at the time of the proceedings taken on the writ of right, H. was seised not as tenant in possession under the original entail, but only in the character of tenant under the entail made by Tregos. So that the right of entry of the younger son R. or his issue, J. S., under the original entail, was not barred.

There is no reason to suppose that the proceedings on a recovery were from the outset a mere juggle. The warranty given in the earlier practice was probably a substantial one, and no doubt some arrangement was made that the formal guarantor was to be indemnified out of the general estate of the tenant in tail who acquired the fee. Thus the tenant in tail was in a position to make a good title to a purchaser; and the remainderman, who might ultimately acquire a right under the form of the entailer's gift, would be secured in a substantial benefit.

But in the formal recovery proceedings the Court had no means of inquiring whether the warranty was a substantial one or not; and when once it had become a settled practice that a good title was acquired under these formal proceedings, the warranty became a mere form; and a man of straw (who in the later practice was usually the crier of the Court) was allowed to appear as guarantor.

The forms of a common recovery became still more complicated in the later practice.

A., the demandant, brought his action (by writ of right)

against B., who was called the tenant to the *præcipe* (a), and who is a person seised in possession in respect of a freehold estate. B. called upon C., the tenant in tail, to warrant his title. This was called "vouching" the tenant in tail to warranty. C., on being vouched, vouched to warranty in the same way the crier of the Court (D.), who was called the common vouchee. The demandant then craved leave to "imparl," or confer in private with the last vouchee, which was granted, and the common vouchee, having then got out of Court, did not return; and judgment was given, as in the case of the proceeding, on a single voucher as before mentioned. The judgment then was that A. should recover possession of the lands, that B. should recover upon his warranty against C., and that C. should recover lands of equal value from D., who was adjudged to be in contempt. A writ was then issued directed to the sheriff to put A. in possession of the lands. On the return of the writ the proceedings are recorded in the Common Pleas pursuant to the statute 23 Eliz. c. 3.

The validity of the proceedings depended upon the tenant to the *præcipe* answering to the description of a person seised in respect of a freehold estate. For, by the common law, the tenant in possession of the immediate freehold is deemed to be capable of defending the estate; so that a judgment properly obtained against such a tenant is binding upon everybody. To make a tenant to the *præcipe*, a deed was employed called the recovery deed, the proper parties to which (speaking generally) were: (1) the immediate freeholder; (2) the tenant in tail (if a different person, *e.g.* a tenant in tail in remainder); (3) the tenant to the *præcipe*; and (4) the demandant. The deed was commonly framed with the *habendum* "unto and to the use of the grantee (the tenant to the *præcipe*) and heirs during the joint lives of himself and the grantor, to the intent that the grantee may be tenant of the freehold for the purpose of suffering a recovery." The object of so limiting the

(a) The word "*præcipe*" is employed merely as being the first word in the common form of the writ by which the action is commenced.

estate was to leave a reversion in the grantor to support contingent remainders (if any) and all powers incident to his estate, such as powers of jointuring and portioning.

By these proceedings with double voucher, and with a recovery deed properly framed, any objection such as that which formed the subject of the rejoinder in *Taltarum's case*, would probably be avoided. There are also precedents in the old styles of recoveries with triple, four-fold, and even six-fold vouchers. In each case the defendant in the writ of right is the person who has, by the recovery deed, been made tenant to the *præcipe*. And the last (or common) vouchee is the one who, after imparlance, makes default in appearing, and has judgment recorded against him as in contempt. In the later practice, the proceedings with double voucher have been generally deemed sufficient. The principle underlying the whole proceeding is that any claim which may thereafter be made under the statute *de donis* by reason of the form of the entailer's gift, is deemed to be satisfied by the "value" (though a mere fiction) adjudged to be recovered by the tenant in tail in respect of the warranty.

The practice of common recoveries, as well as of fines above referred to, was totally abolished by the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74); but the principle underlying the old system of recoveries was so far maintained that to make a disentailing deed under the Act effectual as a complete bar to any claims under the form of the entailer's gift, it is necessary to have the consent of a person who is called "protector of the settlement," and who is, speaking generally, the person entitled to the immediate estate of freehold, or else a person expressly appointed by the deed of entail to be "protector of the settlement." A deed executed by the tenant in tail in reversion (without the concurrence of the protector of the settlement) is only effectual to bar his own issue, just as he might have done before the Act, by levying a fine.

The deed, to be effectual as a disentailing assurance, must be duly enrolled according to the Act. Where the estate

dealt with is an equitable estate the same forms must be observed in order to bar the equitable estates in reversions or remainder; and where the estate is copyhold the requirements are similar, except that enrolment in the Court rolls takes the place of the enrolment in the Court of Common Pleas.

The right of a tenant in tail to bar the entail by a common recovery was subject to some statutory exceptions, the effect of which has been continued by the Fines and Recoveries Act. By a statute of 34 & 35 Hen. VIII. c. 20 (1543) common recoveries of lands granted by the Crown to certain persons and their heirs in tail, could not, if there was a reversion in the Crown at the time of suffering the recovery, be effectual to bar the estates tail. And by an Act 14 Eliz. c. 8 (1572) a recovery suffered by a tenant in tail after possibility of issue extinct was declared void against the person entitled in remainder who should not have consented to the transaction. The power of disposition given by the Fines and Recoveries Act (3 & 4 Will. IV. c. 74) was by sect. 18 declared not to extend to tenants of estates tail who by either of these Acts were restrained from barring their estates tail. The tenant in tail after possibility of issue extinct can only exist under an estate in special tail where the issue in tail are described as the issue of the tenant in tail by a husband or wife named, and who is deceased. For the law does not admit the impossibility of a living person having issue, however improbable such event may be.

There are, moreover, some entails created by special Acts of Parliament which cannot be barred.

There is an estate called a *quasi* entail, where A., a person having a life estate, gives or conveys it to another (B.) and the heirs of his body with remainders over. The estate there conveyed to B. will, in the ordinary course, descend, during its continuance, in the manner pointed out by the gift or conveyance. But such an estate is not within the terms of the statute *de donis*, and therefore A., being the owner in possession, may, under his powers at common

law, bar his issue and all remainders by an ordinary deed of conveyance, without enrolment under the Fines and Recoveries Act (a).

(3) As to a life estate (b) (at common law).

A life estate was (as already observed) the least estate which, according to the feudal law, was considered worthy the acceptance of a free man; and is therefore said to be the lowest estate of freehold. In the earlier periods of our law, to constitute a freehold estate, the estate must be held for the life of the freeholder himself; but, estates have long been considered freehold though held for the life of another, or for a lifetime determinable upon a contingency which may, or may not, happen during the lifetime; so that an estate granted to a widow for her life or widowhood is considered an estate of freehold. It should be observed that an estate for life is considered a greater estate, in the sense above mentioned, than a term of years, although the actual term may be longer than any probable extension of a life. It has been, for instance, not uncommon for land to be leased or granted for terms of 99, 999, or a thousand years, all of which in law are technically less than any estate of freehold, and have always been, in regard to succession, treated as personal property.

Life estates are usually created by settlements made by deed or will. But there are some which exist partly or wholly by operation of law. This happens in the case of a tenant in tail after possibility of issue extinct, as where a tenant in special tail (*e.g.* where an estate has been settled upon A. and his issue by his wife B.) survives B. without issue having been procreated by the marriage. Such an estate partly depends on the settlement by which the tenancy in tail has been created, and partly by the legal effect (under the Statute 14 Eliz. c. 8, p. 136, *ante*) arising from the death without issue. An estate by the curtesy, again, exists purely by operation of law. This is the right of the surviving husband to the life estate in

(a) *Fearne, Contingent Remainders*, p. 495, *et seq.*

(b) See Division of freehold estates, at p. 123, *ante*.

land of which his wife was seised, and there having been issue of the marriage born alive. This right of the husband does not appear to have been affected by the Married Women's Property Act, 1882. For, before the Act, curtesy was held to attach to land which had been settled to the separate use of the wife. But the wife married or acquiring land after the 1st of January, 1883, has, by reason of the separate use created by this Act, full power to dispose of her land *inter vivos* so as to defeat the curtesy. Tenancy in dower is where the husband of a woman is seised of an estate of inheritance and dies, in which case the wife has, by the common law, a life estate in one-third part of all the lands of which the husband was seised at any time during the coverture. But the Dower Act, 1833 (3 & 4 Will. IV. c. 108), which operates in the case of a widow who has been married on or before the 1st of January, 1834, puts it into the power of any husband to defeat the wife's dower by any disposition of his land by deed or will. The same Act extended the dower, in case where no such disposition of the lands were made, to lands to which the husband was entitled in equity, as well as to lands of which he was seised. It should be observed that the tenant in dower is not given the powers of a tenant for life under the Settled Land Acts.

A tenant for life is entitled by the common law, and in the absence of covenant to the contrary, to what are called reasonable estovers; that is to say, to cut wood for fuel to burn in his house, and for necessary buildings and their repairs; also for making and repairing implements of husbandry, and for fencing his enclosures. He is not, however, entitled to cut timber for sale, or to commit any other kind of waste, unless he holds under an instrument expressly declaring his estate to be *without impeachment of waste*, in which case he is entitled to cut timber in a businesslike manner, and generally to use the property as he may think best for his own benefit; but, even under such a title, he would be restrained by a Court of Equity from pulling down or defacing the family mansion, or

cutting down ornamental timber, or from other acts which would manifestly injure the property regarded as a residential estate. A tenant for life *without impeachment of waste* may open new mines, which a tenant impeachable for waste may not, although he may continue to work a mine which had been worked by the settlor. Where a tenant for his own life prepares and sows the land and dies before ingathering of the crop, his representatives are entitled to the *emblems*, or the benefit of the crop which he has sown. So the tenant for the life of another, or the under-tenant who has sown the crop is entitled to the benefit, if the estate has come to an end otherwise than by his own act.

Of the effects of a life-estate in modern times, some of the most important are the statutory powers conferred on the tenant for life by the statute known as "the Settled Land Acts, 1882 to 1890." But as the definition of *tenant for life* on whom these powers are conferred comprises various estates not comprised in the description of freehold estates at common law, the enumeration of these powers will be conveniently postponed until estates or interests in land other than the freehold estates recognised at common law have been described.

Reverting to the arrangement of estates mentioned on p. 123, *ante*, it will be seen that in treating of the first branch, namely, estates at common law strictly so called, much matter has been inevitably introduced which applies also to the classes of estates comprised in the second and third branches of that arrangement. It will now be sufficient to describe very briefly the characters of these two classes of estates as distinguished from the estates at common law as known before the Statute of Uses.

Secondly (a), then, to explain estates at law as created under the Statute of Uses, it is necessary so far to anticipate the description of estates in *equity*, as to observe that by the law, as administered by the original common law courts, a title could be recognised and given effect to

(a) See division of estates, at p. 123, *ante*.

only if clothed with seisin; that is to say, with possession or the immediate right to possession, including the kind of possession which a landlord enjoyed through the actual possession of the tenant. Rights arising from an executory contract, or by way of trust, gave no *locus standi* in these Courts. It became, in course of time, the province of the Court of Chancery—upon so-called principles of “equity”—to enforce such rights; and, consequently, a person whose right depended upon a trust, or upon an executory contract, was said to have an equitable estate. So that if A. is seised for an estate of fee (or for a less estate) *in trust for* (or *to the use of*) X. until he goes to Rome, and thereafter in trust for (or to the use of) Y., the only estate which could be recognised by the common law courts was that of A. And the estates or interests of X. and Y. could only be recognised in a Court of Equity.

In this state of the law the Act 27 Hen. VIII. c. 10 was passed, entitled “An Act concerning Uses and Wills.” By the preamble it appears to have been intended to put an end to various inconveniences which were supposed to arise from the separation of the beneficial estate from the seisin. The statute has had a different, though not less far-reaching, effect. It was by this statute enacted, that where a person is seised of lands or other hereditaments “to the use, confidence, or trust of any other person or persons or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise by any manner of means, whatsoever it be; that in every such case, all and every such person and persons and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee-simple, fee-tail, for term of life, or for years, or otherwise, or any use, confidence, or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments with their appurtenances, to all intents, constructions, and purposes in the law of and in such-like

estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them." The statute in effect extended the meaning of "seisin" to a pure fiction (*a*), and at the same time gave legal effect to estates which the common law courts could not previously have recognised. In other words, the statute "executed the use" in the usee or beneficiary. For instance, in the example above given, the use of the estate for which A. was seised is executed in X. and Y., so that X. will have the seisin or legal estate during the time for which he is entitled, and Y. will have a seisin and legal estate in a contingent reversion—a kind of estate unheard of among the estates previously known at common law. At the same time the statute did little towards effecting the object for which it was designed. For if a conveyance is made by way of feoffment to A. to the use of X., to the use of, or in trust for, Z., etc., the statute, while executing the use in X. so as to give him the seisin and legal estate, makes no provision for the execution of the use or trust in Z., and Z. remains a mere beneficiary under the trust, whose title can only be given effect to by a Court of Equity.

Thirdly (b), as to *estates in equity*. The meaning of these has been necessarily anticipated in order to explain the

(*a*) It may be said, indeed, that the livery of seisin implied in a feoffment according to the later usage was little better than a fiction. But the fictitious seisin introduced by the statute is still more remote from reality. A more purposeful fiction of the same kind is that affected for Scotland by a series of statutes, and ultimately by the Titles to Land (Scotland) Act, 1858 (21 & 22 Vict. c. 76), by which the recording of a conveyance was made equivalent, in effect, to the old practice of giving seisin upon the ground itself.

(*b*) See division of estates, at p. 123, *an'e*.

estates created by the Statute of Uses. The nature of the estate will be further considered hereafter under the head of Trust Property. It may suffice here to say that an *estate in equity*, or an *equitable estate*, is an estate or interest which, by reason of some other person being seised of the property, could not have been recognised according to the practice of the old common law courts. Now, and since the Judicature Acts, all the Courts of Justice administer equity as well as law, and the distinction between the legal and the equitable estate *as a ground of jurisdiction* has become unimportant. But the *legal estate*, so far as it involves the notion of seisin or constructive possession, is still of great importance in a conflict of titles. Generally, it may be said that the person who has for valuable consideration acquired the legal estate *bonâ fide* and without notice of any conflicting equity, is protected against a claim on grounds which, under the old jurisdiction of the courts, might have been enforced in a Court of Equity and not in a Court of Law.

CHAPTER XX.

OF ESTATES OR INTERESTS LESS THAN FREEHOLD IN LANDS, TENEMENTS, AND HEREDITAMENTS.

OF estates, or rather interests, in lands, etc., less than freehold, there are three sorts—(1) estates for years; (2) estates at will; (3) estates by sufferance.

1. An estate for years is an interest constituted by contract for the possession of lands or tenements for some determinate period; and it takes place where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and lessee. The interest is sometimes loosely called “an estate for years,” although the letting is for less than a year, *e.g.* for half a year, for a quarter, or any less time. There is some ambiguity if the letting is expressed to be for a certain number of months. By the construction of the common law, “a month” is a

lunar month (or 28 days), unless otherwise expressed ; and it was formerly so construed in the interpretation of an Act of Parliament. But by the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 3), in every Act passed after the year 1850, the expression "month" means calendar month. And it may now easily be presumed that the same meaning is intended by the expression in a modern deed or contract, though perhaps it is better (if so intended) to use the term "calendar month."

According to the strict doctrine of the common law, it was necessary, in order to create an estate or legal interest, that the lessee should enter. But as the lessee, who had become, under an agreement, unconditionally entitled to get possession for his term, became seised by the fiction of law under the Statute of Uses, the actual entry has long been practically unimportant in order to create the interest. And, moreover, if a lease is made by deed by a person who has no interest in the land at the time, any interest which the lessor may subsequently acquire will pass to the lessee to the extent of the interest purported to be given by the lease. This is on the principle quaintly expressed in the books by the maxim that "the interest, when it accrues, feeds the estoppel" (a). The rules of equity apply the same principle to the interest which a lessor subsequently acquires, whether he has or has not at the time of the lease any interest, and whether the lease, being for valuable consideration, is made by deed or not.

The tenant for years, as well as a tenant for life, is entitled by the common law to emblements ; that is to say, to gather in due time the crops which he has sown, tendered, and manured during his term, and which in the ordinary course of nature might have matured within the terms of the tenancy. Thus a tenant whose term expires at Michaelmas is entitled not only to gather belated corn crops, but in due course to gather in, or to feed off the land, the root crops which, although ordinarily maturing (or nearly so) by

(a) The principle is much better described by the expression "accretion of title" used in Scotch law. In classical language, "*jus superveniens accrescit successoribus*."

Michaelmas, frequently require to be left in the ground some time longer, in order to obtain the full benefit of them. The extent of this right must depend, to some extent, on the kind of crop and the custom of the district. The right to emblements does not extend to a second crop, where a first crop arising from the same labour and manuring has already been reaped (*Graves v. Weld* (1833), 2 Barn. & Adol. 105). Nor does it extend to a crop which could not be reasonably expected to mature within the term. So it is said that a tenant whose term under his agreement expires at midsummer is not entitled after midsummer to gather in a crop of corn which he could not have expected to ripen sooner. Nor does the right to emblements ordinarily extend to the fruit of trees rooted in the ground and bearing a yearly crop. But it does extend to the crop of hops which, although growing from the old roots, depends mainly upon the labour and manuring of the current year (*Latham v. Atwood*, Cro. Car. 515, cited in *Graves v. Weld* (1833), 2 Barn. & Ald. 109; 10 R. C. 383). The trees and plants forming the stock-in-trade of a nursery gardener are removable by him at the end of his tenancy (*Penton v. Robart* (1801), 2 East, 90, *per* Lord KENYON; *Elwes v. Maw* (1802), 3 East, 45*n*, *per* LAWRENCE, J.). But these should be regarded rather as trade fixtures than as emblements.

Where a tenant for years held under a lessor who was himself a tenant for life, the tenant for years was formerly, upon the death of the lessor, entitled to emblements in the same manner that the executors of a tenant for life were entitled. But under the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), where the lease of land held by a tenant at rack-rent determines by the death of the landlord entitled for his life, or upon the cesser of the estate of the landlord entitled for any other uncertain interest, the tenant is entitled, instead of emblements, to hold and occupy the land until the expiration of the then current year of his tenancy, paying the apportioned rent to the succeeding landlord or owner, and otherwise holding on the same terms as if his lease had expired by effluxion

of time. But where the tenant is not within this Act—for instance, where he holds not at a rack-rent, but under a beneficial lease—he appears to be entitled to emblements according to the common law as above stated.

By the Statute of Frauds (29 Car. II. c. 3, s. 1), a lease for a fixed number of years may be made by parol if the term do not exceed three years from the making thereof, and if the rent reserved amount to two-thirds at least of the full improved annual value of the land. Leases for a longer term of years, or at a lower rent, were required by the statute to be put in writing and signed by the parties making the same, or their agents thereto lawfully authorised by writing. And by the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 3), a lease required by law to be in writing of any tenements or hereditaments is void *at law* unless made by deed. But it has been decided that such a lease in writing, and signed, although not made by deed, may take effect in equity as an agreement for a lease (*Parker v. Taswell* (1858), 2 De G. & J. 559; 27 L. J. Ch. 812; 8 R. C. 642).

Out of the various stipulations which may be contained in leases, and their effect, it will be convenient here to note an important distinction between covenants which run, and those which do not run, with the land. In general, where the lessee has covenanted for himself and his assigns as to the manner in which the demised premises are to be enjoyed or dealt with, the covenant is said to run with the land, so that an assignee of the lease is bound by the covenant, by reason of his privity of estate with the lessor. So the covenant for payment of rent, as something to come out of the land, runs with the land, so that the assignee is liable. Where the assignee has himself assigned to another, he becomes exonerated in respect of any future breach, and the new assignee becomes liable by privity of estate. By the doctrine of equity the burden of a covenant upon assignees is extended to some covenants which would not have been regarded at law as running with the land, provided the covenant is restrictive and the assignee, at the time of taking the assignment, has notice of it.

It remains to note the tenancies made from year to year, or extending to a still shorter period. Apart from tenancies constituted by express stipulation for a definite short period, which are given effect to according to the express terms of the stipulation, it is necessary to note the conditions which are implied in (1) tenancies from year to year, (2) tenancies at will, and (3) tenancies on sufferance.

Of agricultural tenancies, the most important in England is the tenancy from year to year. For, besides being frequently employed in the express constitution of the tenancy, it is implied in a large number of cases, where the term of the tenancy has either not been limited by express agreement, or where the tenant has, with the consent of the landlord, held over beyond the express term of the original tenancy.

In tenancies from year to year it has long been the usage, recognised by law, that, in order to determine the tenancy, at least half a year's notice must be given before the expiration of the current year of the tenancy. If no notice is given, there is an implied contract that the tenancy shall continue for another year. By the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61, s. 33), "where half a year's notice, expiring with a year, is by law necessary and sufficient for determination of a tenancy from year to year, . . . a year's notice so expiring shall be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient." The same Act and other Acts comprised in the "Agricultural Holdings Acts, 1883 to 1900,"* contain various provisions for securing a tenant in a fair compensation for outlay for improvements, damage by game, unreasonable disturbance of tenancy, etc.

2. Reverting to the division of estates less than freehold at p. 142 *supra*, an estate or tenancy at will is where land is let by one man to another to hold at the will of the lessor, and the tenant obtains possession accordingly. Such

* Short title given by 6 Ed. VII. c. 56, s. 10.

a tenancy is, speaking generally, determinable immediately by either party at his pleasure, and this determination may be effected by express notice or by some unequivocal act inconsistent with the continuance of the tenancy. But the effect of such determination is subject to some restriction. For if the tenant at will cultivates and sows the land, and, before the crop is ripe, the landlord determines the tenancy, the tenant is entitled to emblements, on the same principle as when a life tenancy is determined by death. It must be noted that a demise of land without any certain term being mentioned, and especially where an annual rent is reserved, will be construed as intended to create a tenancy from year to year rather than a tenancy at will. So that such a tenancy will be only determinable upon a year's notice as above mentioned.

Although, as already mentioned (a), the interest of the copyhold tenant has by long usage become in effect an estate of a permanent character, only subject to special conditions according to *the custom of the manor*; the copyholder of a manor (other than those held in ancient desmesne) still holds nominally (as he at one time did in fact) *at the will of the lord*.

3. An estate or tenancy at sufferance (b) is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a person takes a lease for a term certain, and after the expiry of the term continues to hold without any leave, or any act (such as receiving rent) from which leave may be implied, from the owner of the estate, such person becomes a tenant on sufferance. Or where the tenant of a person who has a particular estate holds over, without agreement, after that estate is ended: *Doe and Martin v. Watts* (1797), 7 T. R. 83. The right of the owner to recover compensation from the tenant so holding over—for which the common law provided no sufficient remedy—was better secured by the statutes 4 Geo. II. c. 28 (1731), and 11 Geo. II. c. 19, s. 15 (1738).

(a) See p. 119, *ante*.

(b) See division of topics at p. 142, *ante*.

CHAPTER XXI.

OF THE POWERS OF A TENANT FOR LIFE UNDER THE
SETTLED LAND ACTS.

HAVING now described the various kinds of estates or interests in land, it is convenient to state briefly the powers of the tenant for life under the Settled Land Acts (*a*).

The primary object of these Acts was to render land easily marketable, having due regard to the substantial interests of the persons beneficially interested in possession, reversion, or otherwise. This object had been already attained in regard to land taken for public purposes, such as canals, railways, etc., by clauses contained in a long series of special Acts of Parliament, and now contained in the Lands Clauses Consolidation Act, 1845, so as to be conveniently incorporated in subsequent Acts authorising the taking of lands for undertakings of a public nature. These Acts doubtless suggested to the authors of the Settled Land Acts, the extension to all settled lands of the principle that the tenant in possession for an estate not less than a life-estate should be entitled to sell and convey without the cumbrous proceedings which had been already employed, in exceptional circumstances, either under special enabling Acts, or under the general Acts relating to leases and sales of settled estates (consolidated by the Settled Estates Act, 1877). While extending to settled land generally the powers of the tenant for life conferred by the Acts authorising the taking of land for certain public purposes, the Settled Land Acts (1882 to 1890) made provision for payment and application of the purchase-money so as to avoid, in most cases, the costly machinery of applications to the Court, such as were generally required for the working out of the provisions of the Lands Clauses Consolidation Act, 1845, or of the former Acts relating to leases and sales of settled estates.

(*a*) The Settled Land Acts, 1882 to 1890. They are as follows: (1882) 45 & 46 Vict. c. 38; (1884) 47 & 48 Vict. c. 18; (1887) 50 & 51 Vict. c. 30; (1889) 52 & 53 Vict. c. 36; (1890) 53 & 54 Vict. c. 69. Collective short title by 59 & 60 Vict. c. 14.

For the purposes of the Settled Land Acts, "the person who is for the time being, under a settlement, beneficially entitled in possession (including receipt of income) of settled land for his life," is the tenant for life of land under the settlement (a).

The importance of the person answering to this description of "tenant for life under the settlement" consists in the powers conferred upon him. These powers are conferred, not only upon the person strictly answering to this definition of "tenant for life," but also upon every person, while his interest is in possession, answering to the following descriptions:—

(i.) A tenant in tail, including a tenant in tail who is barred by special Act of Parliament from defeating his estate tail, and although the reversion is in the Crown, and so that the exercise of the power shall bind the Crown (but, excepting a tenant in tail of land purchased with money provided by Parliament for public services, and restrained by Act of Parliament for defeating the estate tail).

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event.

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of the power shall bind the Crown.

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent.

(v.) A tenant for the life of another, not holding merely under a lease at a rent.

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is defeasible by conditional limitation or otherwise.

(vii.) A tenant in tail after possibility of issue extinct.

(viii.) A tenant by the curtesy.

(a) Settled Land Act, 1882, s. 2 (5), (10), (i.) and (ii.); s. 58 (ix.) and s. 63; and Settled Land Act, 1884, ss. 6, 7.

(ix.) A person entitled to the income of land under a trust or direction for payment of the income to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until bankruptcy, etc.

Persons answering to any of these descriptions are briefly included in the phrase "persons having the powers of a tenant for life" under the Settled Land Acts.

The powers of a tenant for life (including the persons having the powers of a tenant for life as above mentioned) include, speaking generally, the powers which in a well-drawn settlement are usually conferred upon the tenant for life, or upon trustees, or upon some other person. Only in the case where by settlement the land has been conveyed to trustees upon trust for sale, an order of the Court is required (by the Settled Land Act, 1884, s. 7) to enable the person beneficially entitled to the income to exercise the powers of a tenant for life (*a*). When such an order has been made the power of the trustees to sell according to the terms of the settlement is suspended.

The powers include powers of sale, enfranchisement, exchange, and partition, with the elastic provisions usual in a well-drawn settlement (*b*).

They also include powers of leasing by deed for terms not exceeding—

- (i.) in case of building lease, 99 years ;
- (ii.) in case of a mining lease, 60 years ;
- (iii.) in case of any other lease, 21 years :

every lease to take effect in possession not later than twelve months after its date ; reserving the best rent that can reasonably be obtained ; and with proper conditions for securing the building purposes, in the case of a building lease, and, in the case of a mining lease, where the tenant is impeachable for waste, with a provision for setting aside a due proportion of the mining rents for the benefit of the persons entitled in remainder (*c*).

(*a*) Settled Land Act, 1884, s. 7.

(*b*) Settled Land Act, 1882, ss. 3, 4, 5.

(*c*) *Ibid.*, ss. 6-11.

Where a fine is taken upon the granting of a lease, it is to be treated as capital money under the Act (a). A building lease may contain an option of purchase within ten years (b).

There are special powers enabling the tenant for life to carry out a contract for a lease made by a predecessor in title which, if so made, would have been binding on the successors; and to surrender an old lease and make a new one (c); and to grant licences to copyhold tenants or tenants of customary land to make leases such as the tenant for life might himself have made of freehold land (d).

To authorise a sale, exchange, or lease of the principal mansion house on settled land, and the pleasure grounds and park usually occupied therewith, the consent of the trustees of the settlement or an order of the Court is required (e). The principles on which an order of the Court for this purpose will be granted were much discussed in the case of *The Marquis of Ailesbury's Settled Estates*, 1892, 1 Ch. 506; 1892, A. C. 356; and it was held that the Court, in exercising its discretion, would take into account, not only the wishes and interests of the tenant for life and remaindermen, but the circumstances of the estate and the benefit of the tenants and persons living on it. In this case, the tenant for life being so impoverished by having charged his life interest that he could not reside on the estate, the Court sanctioned the sale of the estate, including the mansion-house and pleasure grounds, for a good price to a wealthy purchaser (f).

There are further special powers to appropriate land for streets and open spaces, to sell, exchange, make partition of, or lease, the surface of the land apart from the minerals, and *vice versâ* (g); and to raise money on mortgage of the settled land for money required for enfranchisement or for equality of exchange or partition (h).

(a) Settled Land Act, 1884, s. 4.

(b) Settled Land Act, 1889, s. 2.

(c) Settled Land Act, 1882, s. 13.

(d) *Ibid.*, s. 14.

(e) Settled Land Act, 1890, s. 10.

(f) See Ruling Cases, "Settled Land Acts," No. 4, and notes, 24 R. C. pp. 91-117.

(g) Settled Land Act, 1882, s. 17.

(h) *Ibid.*, s. 18.

The tenant for life of an undivided share may concur for the purposes of the Act with the persons entitled to or having power to dispose of the other undivided shares (*a*); so that by the powers of the Settled Land Acts, together with the Partition Act, 1868 (31 & 32 Vict. c. 40), an estate held in shares is generally marketable.

Capital money arising under the Act is to be paid either to the trustees of the settlement or into Court, at the option of the tenant for life (*b*). But if paid into Court it may, if the Court thinks fit, at any time be paid out to the trustees of the settlement for the purpose of the Settled Land Acts (*c*).

Capital money arising under the Act is to be invested or applied to all or any of the following modes or purposes (*d*):—

(i.) Investment in Government securities, or other securities authorised by law for investment by trustees.

(ii.) Discharge of incumbrances affecting the settled land, including redemption of land-tax, tithe, rent-charge, etc.

(iii.) Improvements authorised by the Acts (*e*).

(iv.) Payment for equality of exchange or partition.

(v.) Purchase of seignory of any part of the settled land, being freehold land, or of the fee-simple of any part, being copyhold or customary land.

(vi.) Purchase of the reversion of land held for years or life or years determinable on life.

(vii.) Purchase of other land in fee simple or of copyhold or customary land or leasehold land having sixty years unexpired [the land to be in England if the settled land sold is in England (s. 23)].

(viii.) Of minerals to be worked with the settled land or easements convenient to be held therewith.

(ix.) In payment to any person becoming absolutely entitled, or empowered to give an absolute discharge.

(*a*) Settled Land Act, 1882, s. 19.

(*b*) *Ibid.*, s. 22.

(*c*) Settled Land Act, 1890, s. 14.

(*d*) Settled Land Act, 1882, s. 21.

(*e*) For improvements authorised see sect. 25 of the Act of 1882.

(x.) In payment for costs, etc., incidental to the exercise of the powers of the Acts.

(xi.) In any other mode of investment authorised by the settlement.

A tenant for life, although impeachable for waste, may, for the purpose of executing improvements under the Act, get and work stone, sand, brick-clay, or other materials, and cut down timber, other than ornamental timber, without being accountable for waste in so doing (*a*). He may also, with the consent of the trustees of the settlement, or under an order of the Court, cut down and sell timber which is fit and ripe for cutting, so that three-fourths of the net proceeds of the sale shall be set aside as capital money, and the other one-fourth go as rents and profits (*b*).

Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life may, by an order of the Court, sell the chattels or any of them, the proceeds to be applied as capital money (*c*).

Trustees of the settlement for the purposes of the Act are the persons (if any) who are trustees with power of sale or with power to consent to a sale (*d*) (either in the present or in the future) of the settled land, or having present power of sale of other land subject to the same limitations as the land to be sold (*e*); or, if there are no such persons, then trustees for the purposes of the Act may be appointed by the Court on the application of the tenant for life or of any other person interested (*f*). The object and effect of these provisions is that there may always be some persons capable of giving a valid receipt for the purchase-money of property sold under the powers of the Acts (*g*).

The tenant for life intending to exercise the powers of the

(*a*) Settled Land Act, 1882, s. 29.

(*b*) *Ibid.*, s. 35.

(*c*) *Ibid.*, s. 37.

(*d*) *Ibid.*, s. 2.

(*e*) Settled Land Act, 1830, s. 16.

(*f*) Settled Land Act, 1882, s. 38.

(*g*) *Ibid.*, s. 40.

Act must give notice to the trustees of the settlement, and to their solicitors, if there is one known to him; but a purchaser dealing in good faith is not bound to inquire respecting the giving of such notices (*a*).

The powers of a tenant for life are not capable of assignment or release; and any contract by a tenant for life not to exercise his powers under the Act is void. But the right of an assignee for value of the estate or interest of the tenant for life shall not be affected without his consent, except that the tenant for life, remaining in possession, shall be capable of making a lease at the best rent that can be obtained (*b*).

No settlement can be framed so as to prevent the tenant for life exercising his powers under the Act (*c*); nor, notwithstanding anything contained in the settlement, shall the exercise by a tenant for life of any power under the Act occasion a forfeiture (*d*).

A purchaser, or other person, dealing in good faith with a tenant for life, shall be conclusively deemed to have given the best price or consideration as the case may require (*e*).

Nothing in the Act shall abridge any power contained in the settlement, except that, notwithstanding anything in the settlement, the consent of the tenant for life (or of one or more persons constituting the tenant for life) shall be necessary to the exercise by trustees of the settlement or any other person of any power contained in the settlement for any purpose provided for in the Act (*f*). A settlement may, however, confer upon a tenant for life larger powers than are contained in the Act, or may confer such powers upon trustees (to be exercised with the consent of the tenant for life) (*g*).

Where the person having the powers of a tenant for life, or the person absolutely entitled in possession to land, is an

(*a*) Settled Land Act, 1882, s. 45.

(*b*) *Ibid.*, s. 50.

(*c*) *Ibid.*, s. 51.

(*d*) *Ibid.*, s. 52.

(*e*) *Ibid.*, s. 54.

(*f*) Settled Land Act, 1882, s. 56, as amended by Settled Land Act, 1884, s. 6 (2).

(*g*) Settled Land Act, 1882, s. 57.

infant, the powers conferred by the Act upon a tenant for life may be exercised on behalf of the infant by the trustees of the settlement; or, where there are none, by a person appointed by the Court on the application of a guardian or next friend (*a*).

Where a husband is entitled in right of his wife, married to him before the 1st of January, 1883 (*b*), to property which accrued to her before that date, and in or over which, but for the marriage, she would be tenant for life or have the powers of the tenant for life, she and her husband together have the power of a tenant for life (*c*).

A restraint on anticipation upon a married woman contained in a settlement shall not prevent her exercising the power of a tenant for life under the Act (*d*).

The powers of a tenant for life, found lunatic by inquisition, may be exercised by the committee of his estate under an order of the Court (*e*).

When land is held by trustees *upon trust* or upon a *direction for sale*, or where certain persons are by the settlement declared to be trustees of the settlement for the purposes of the Settled Land Acts, the consent of the tenant for life (if not required by the terms of the settlement) is not required for a sale by the trustees; but the powers of a tenant for life under the Acts are not to be exercised without leave of the Court (*f*).

CHAPTER XXII.

RIGHTS BY WAY OF SECURITY OVER LANDS, TENEMENTS, AND HEREDITAMENTS.

A RIGHT by way of security implies two qualified rights of property in the same subject; that is to say, the right of the holder of the security (B.) derived out of the original or

(*a*) Settled Land Act, 1882, ss. 59, 60.

(*b*) See Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(*c*) Settled Land Act, 1882, s. 61.

(*d*) *Ibid.*, s. 61 (6).

(*e*) *Ibid.*, s. 62.

(*f*) *Ibid.*, s. 63; and Settled Land Act, 1884, ss. 6, 7.

paramount right of property in another (A.). The right is constituted by contract, or by operation of law, in order to secure the performance of an obligation owing by A. to B., and is such that, on the complete performance of the obligation, the right of property in B. ceases; the entire right of property becomes vested in A.; and B. is bound, on A.'s request, and at his expense, to give a legal discharge, and, if necessary, to execute a reconveyance of the property to A.

Where the right in security is constituted by contract, it is commonly called a mortgage (*a*); where, by operation of law, it is called a lien (*b*).

The subject of the security is, for the present, assumed to consist of lands, tenements, and hereditaments.

A mortgage may be either legal or equitable; that is to say, may be constituted by a conveyance of the legal estate, or by a transaction creating an equitable right, enforceable according to the former constitution of the Courts, only by the Court of Chancery. And although, under the Judicature Acts, all the Courts now take cognisance of equitable as well as legal rights, the legal estate is still of great importance as conferring a right available against all persons; whereas the equitable estate is, speaking generally, available only against (1) persons who have acquired right by a gratuitous conveyance, or (2) purchasers having notice of the equitable right, or (3) subsequent purchasers who have themselves only an equitable estate.

By a legal mortgage, according to the usual modern form, A., who is seised or entitled in fee-simple, grants to

(*a*) The term "mortgage" has been considered as strictly applied where property was conveyed from B. to A. upon a condition subsequent for defeasance of the conveyance on payment of the obligation within a certain time (Littleton, sect. 332). Coke adds that it is called mortgage, to distinguish it from *vicum radium*, as where a man borrows £100 of another and maketh an estate of lands unto him until he has received the amount out of the issues and profits of the land. Why the pledge should be deemed to be dead in the one case and living in the other is not very clear.—R. C.

(*b*) Here the term "lien" is used in the popular and wide sense so as to include the kind of security known in the Roman and kindred systems as *hypotheca*.—R. C.

B. all that, etc. [description of the property] “To have and to hold the hereditaments and premises hereinbefore expressed to be granted unto the said B., his heirs and assigns. To the use of the said B., his heirs and assigns, subject to the proviso for redemption hereinafter contained.” And this is followed by the proviso for redemption by A. on payment of the debt with interest on a certain day. Or, employing the form of statutory mortgage set forth in the Third Schedule to the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), A., “as mortgagor and as beneficial owner, conveys to B. [all that, etc.] To hold to and to the use of B. in fee simple for securing payment on the day of , 19 , of the principal sum of £ as the mortgage money with interest thereon at the rate of per centum per annum.”

Now if, as very seldom actually happens, A. should pay the debt including interest, punctually on the day named, he would, by the proviso operating under the Statute of Uses, have the legal estate or seisin revested in him without the aid of equity. But, according to the rule long established in Courts of Equity, he has the further right, until a decree of foreclosure, which could only be made after due (generally six months) notice, to require a reconveyance on payment of the debt. So that, notwithstanding default according to the strict terms of the proviso, A. has still the equitable estate subject to B.'s legal estate in security. Besides the remedy of foreclosure, the mortgagee, where the mortgage is made by deed, is entitled to sell the property, after due notice, so as to give an absolute title to the purchasers. In a formal mortgage by deed, before the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), this power was almost invariably expressed in the deed; and now by sects. 19–21 of that Act, this power, under certain conditions as to notice, etc., is, in effect, implied in all subsequent mortgages made by deed. Only, where the conditions are intended to be different from those in the statutory clauses, an express power of sale is still generally employed.

An equitable mortgage may be created by an instrument not under seal whereby the mortgagor charges the land, etc., with the debt or in security of the obligation, or agrees, in any form, to the effect that the lands, etc., shall be held in security of the debt or obligation. And where a deed is made under seal intended to create a legal mortgage, but which, for want of some formality, cannot take effect as a legal mortgage, it will create a good equitable mortgage. And where a person who has himself only an equitable estate purports to create a legal mortgage, the mortgagee will be in the same position as an equitable mortgagee, except that, if the mortgagor acquires the legal estate, the legal title will *ipso facto* accresce to the assignee (a).

An equitable mortgage may also be created by the owner of the land, etc., depositing with a person making an immediate advance, title deeds of his land, etc., with the intention of securing to the person advancing the money either the sum so advanced or a debt antecedently due to the same person, or both. The intention in such a case may be proved by oral evidence, as the present advance and the act of deposit have been held sufficient to prevent the application of the Statute of Frauds (29 Car. II. c. 3, s. 3).

Of rights in security over lands, etc., constituted by operation of law, the most important, perhaps, are the rights arising in an execution upon a judgment for a debt. The remedy against the debtor's land was formerly taken by suing out a writ called a writ of *elegit*, under which the sheriff delivered to the creditor *one-half* of the debtor's land until the debt could be levied to a reasonable price or extent (b). The remedy was extended by the Acts in the reign of Queen Victoria (c). Under these Acts the sheriff is empowered to deliver in execution the whole of the

(a) See p. 143, *ante*, and note (a) there.

(b) Stat. 13 Ed. I. c. 18, called the Statute of Westminster the Second.

(c) The Judgments Acts, 1838-1864 (1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; 23 & 24 Vict. c. 38; and 27 & 28 Vict. c. 112).

debtor's lands, and, provided the writ of execution is duly registered, the creditor may apply to the Court for authority to sell the lands.

A more simple kind of security is afforded by the power of the Court under the Judicature Acts, in all cases where it is "just and convenient"—a phrase which has been construed to apply in every case where a judgment creditor asks for it—to appoint a receiver. Such an appointment, in effect, creates an equitable right in security over the debtor's lands as well as his other property. Where, however, the receiver has taken possession by notice to the tenants or otherwise, he has, in effect, all the rights of a legal mortgagee.

Another important right in security over land is that of the vendor for unpaid purchase-money, commonly called the vendor's lien. This right exists as a legal right before conveyance, and as an equitable right after conveyance. In the case of a railway company, or other company constituted for public purposes, with powers under the Lands Clauses Consolidation Act, 1845, the lien arises both for the price and compensation payable for land taken under the Act. And where such a company is in difficulties, payment has been frequently delayed until an action, formerly a suit in Chancery, has been brought to enforce the lien. If the railway has not been opened for public traffic, the judgment is for specific performance, and, in default for payment, for sale and an injunction. If the railway has been opened for public traffic, the Court will not readily grant an injunction, but will make an order for a receiver, which has been found in practice usually sufficient to bring in the desired payment.

CHAPTER XXIII.

REMAINDERS, VESTED AND CONTINGENT, AND OTHER ESTATES *IN FUTURO* (IN LANDS, TENEMENTS, AND HEREDITAMENTS).

A REMAINDER, properly so-called, in lands, tenements, and hereditaments, is an estate recognised by the common law, and being the estate of the person entitled upon and after the expiration of an estate of freehold. This estate of freehold must be less than the fee-simple.

The words "vested" and "contingent," according to their primary and popular meaning, imply some kind of difference in the degree of certainty that the rights (which are assumed to be rights *in futuro*) will at some time or other take effect in possession. The exact kind of difference is not always easy to be defined, as will be shown in the sequel. But the use of the words "vested" and "contingent," as applied to remainders, strictly so-called, in land, tenements, and hereditaments, has a different meaning, and one which has been found capable of an exact definition. This is given by Fearne as follows (a): "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable, as the remainder-man may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

"For instance," the learned author continues, "if there be a lease for life to A., remainder to B. for life, here the remainder to B., although it may possibly never take effect in possession, because B. may die before A., yet, from the very instant of its limitation, it is capable of taking effect in possession, if the possession were to fall by the death of

(a) Fearne, *Contingent Remainders*, vol. i. p. 216 (10th edit.).

A ; it is, therefore, vested in interest, though perhaps the interest so vested may determine, by B.'s death, before the possession he waits for may become vacant.

“On the other hand, if there be a lease for life to A., and after the death of J. D., remainder to B. in tail, in that case the remainder to B. is not capable of taking effect in possession during the life of J. D., although the possession should fall by the determination of A.'s estate: but if J. D. chance to die before the determination of the particular estate, then does B.'s remainder by such event become capable of taking effect in possession when it shall happen to fall, and is then in the same state as if it had been originally limited without any regard to the death of J. D. This very essential alteration in the nature of B.'s remainder, occasioned by the timely event of J. D.'s death, is the change of a contingent into a vested estate; before that event it had not the capacity of vesting in possession, and it was doubtful whether it ever would have it or not; it was, therefore, not vested at all: by that event it acquires the capacity of vesting in possession, when the possession becomes vacant; it is, therefore, vested in interest, though it is yet uncertain whether it ever will vest in possession, for it is still possible that B. may die without issue during the continuance of the particular estate.”

To appreciate the application of the principle, it is necessary to keep in mind that, according to the common law, a life estate may be determined by events other than the death of the tenant for life. The estate might, under the common law, come to an end by escheat or forfeiture; by merger, *e.g.* by the tenant for life acquiring the fee-simple; or by his making a tortious feoffment, *e.g.* a feoffment for an estate greater than for his own life. The following example, cited by Fearn, is a good illustration. “Suppose a lease be to A. for life, remainder to B. during the life of A., and the question to be put, whether this remainder to B. be vested or a contingent interest:” it is clear (as Fearn shows) upon the authorities, that, although the event in which B.'s remainder would take effect is very

unlikely, yet the remainder is a vested and not a contingent remainder, because it is capable of taking effect in possession immediately on the occurrence of any of the events in which it could take effect at all, namely, upon the estate of A. coming to an end by forfeiture or otherwise in his lifetime.

The most important distinction, in effect, which formerly existed between a vested and a contingent remainder consisted in this, that if, when the preceding estate came to an end, the remainder was not capable of taking effect in possession, the remainder failed, and an ulterior remainder, if then vested, took immediate effect. But this distinction has ceased to exist from and after the 1st of January, 1845. For by the Real Property Act, 1845 (8 & 9 Vict. c. 106), it was enacted (by sect. 4) that a feoffment made after the 1st day of October, 1845, shall not have any tortious operation: and (by sect. 8) that a contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this Act (4th August, 1845), shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened.

In family settlements it has been a usual practice to convey the property to [the use of] A. (the settlor) for life, remainder to [the use of] B. (his eldest son) for life remainder, to [the use of] the first and other sons of B. in their order of seniority and their respective issue, etc. If B. had no issue at the time of the settlement, the remainder to his sons, etc., would clearly be a contingent remainder, and, to avert the consequence of the remainder failing as a contingent remainder, it was formerly the practice to insert between the life estate of B. and the remainder to his sons, etc., a remainder "to the use of X., Y., and Z., and their heirs, during the life of B.," upon trust to preserve the contingent remainders. The effect of this was, upon the occurrence of such an event as forfeiture, etc., by B., to

make the remainder a vested remainder capable of taking effect upon the termination of the estate of the trustees, which would necessarily be contemporaneous with the termination of the natural life of B. Since the Real Property Act, 1845, such an expedient became unnecessary, and fell out of use.

The result of the Act of 1845 was to prevent the failure of a contingent remainder in most of the cases where such a remainder would have been defeated by the common law.

It is still, however, the rule that a contingent remainder must, in its creation, have a preceding estate of freehold to support it, and that if, on the natural termination of that estate, the remainder is not capable of taking effect as an estate in possession, the remainder fails altogether.

A contingent remainder amounting to a freehold cannot be limited upon an estate for years or any other particular estate less than a freehold. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B.; this remainder is void; but if granted to A. for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him without vesting somewhere; and, in the case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

It will appear from what has been already said (a), that a contingent remainder, properly so called, could not be limited upon a preceding fee-simple estate.

Future estates, created under a devise of real estate, are not treated by law as remainders, but are allowed a more elastic construction. In effect a devise of lands on some future contingency differs from a remainder in three material points: (1) that it needs not any particular estate to support it; (2) that, by such a devise, a fee-simple or other less estate may be limited after a fee-simple, and so as to

(a) p. 124, *et seq.*, *ante*.

determine the prior estate; (3) that by such a devise a term of years may be given to one man for his life, and afterwards limited over to another. This could not have been done by deed at common law.

So also estates limited in the future by means of the Statute of Uses (*a*), whereby the use, and (by the fiction of the statute) the seisin, shifts from one person to another, are not remainders in the strict sense of the word; and the definition of the words "vested" and "contingent," as above applied to remainders, does not apply to these estates.

Again, where the term "vested," or "contingent," is employed in reference to estates created by way of executory use or devise, it is to be taken in the popular sense, as denoting a comparative degree of certainty that the estate will take effect in the future. With regard to these estates, as well as future interests created under trusts, the only legal consequence of an estate or interest being "contingent" (as contrasted with "vested") in the sense of there being an uncertainty as to its ever coming into effect, or as to the person who will enjoy it, is that arising under the rule of perpetuities; namely, that a future estate must, if well created, be capable of vesting within the lifetime, or within twenty-one years after the death, of a person living at the time when the instrument of settlement is executed, or the devise comes into operation.

The future estates hitherto considered are created by grant or other instrument made by the owner of a larger estate, who carves out of his own estate an estate in possession and one or more estates *in futuro*. Another kind of future estate is that called a *reversion*, which is created not by a deed or other instrument of conveyance, but by the act and operation of the law itself.

An estate in *reversion* (as described by Blackstone) "is the residue of an estate left in the grantor, to commence in

(a) By this is meant if the estates are given in such a way as can only be intended to operate by the Statute of Uses. If they are intended as remainders, although expressed to be "to the use of A., remainder to the use of, etc.," they would be regarded in law as remainders.

possession after the determination of some particular estate granted out of him. Sir Edward Coke (1 Inst. 142) describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law; and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never, therefore, created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsentî* though taking effect *in futuro*."

From this definition of reversion it follows that the particular estate to the determination of which it relates must be less than a fee-simple, and that consequently the relations between the grantor and grantee are not affected by the statute *Quia Emptores*. Hence (in estate of feudal tenure), besides the rent (if any) reserved by the grant, the obligation of fealty (owing by the grantee to the grantor) results as of course, as an incident to the reversion. Where no rent is reserved, the fealty is inseparable from the reversion, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may, by special words, be granted away, reserving the rent; but by a general grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale*."

Whether a future estate is a remainder or reversion

depends upon the essential character, and not on the expression of the instrument creating the particular estate. Thus, if A., being seised in fee, makes a lease for life to B., with remainder to himself and his heirs, this is properly a mere reversion, to which rent and fealty shall be incident. And if a man, seised in fee, grants a lease for life to A., reserving rent, with reversion to B. and his heirs, B. has a remainder and not a reversion to which the rent is incident; but the grantor is entitled to the rent during the continuance of A.'s estate.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealment of their deaths, it is enacted by the statute 6 Ann. c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the Court of Chancery and order made thereupon), once in every year, if required, be produced to the Court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

To conclude the subject of remainders and reversions, it remains to state the rule relating to *merger*. Wherever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. "Thus," Blackstone observes, "if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and

subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger, for he hath the inheritance in his own right, the lease in the right of his wife. An estate tail is an exception to this rule; for a man may have in his own right both an estate tail and a reversion in fee; and the estate tail, though a less estate, shall not merge in the fee. For estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *de donis*; which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate tail, the case is otherwise; the tenant for a long time had no power at all over it, so as to bar or to destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like; it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim that a tenancy in tail which cannot be surrendered, cannot also be merged in the fee."

The doctrine of merger has been applied to equitable as well as legal estates provided that the estates are both equitable, and that the application of the rule would not be productive of what would, in a Court of Equity, be considered as injustice.

Reference has already been made to the statute (a) whereby a contingent remainder does not fail to take effect by reason of the determination by merger of the preceding estate of freehold.

(a) 8 & 9 Vict. c. 106. See p. 162, *ante*.

CHAPTER XXIV.

OF TENEMENTS HELD IN SEVERALTY, IN JOINT-TENANCY,
IN CO-PARCENARY AND IN COMMON.

LANDS or tenements, with respect to the number of owners who may hold contemporaneously, may be held in four different ways—in severalty, in joint-tenancy, in co-parcenary, and in common.

1. He that holds in severalty holds in his own right only, without any other person being joined or connected with him in point of interest.

2. An estate in joint-tenancy is where lands or tenements are granted to two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will. If an estate be given to a plurality of persons without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B., and their heirs, this makes them immediately joint-tenants in fee of the lands.

By a joint estate is meant that two or more persons are joined in one and the same estate. The unity so implied is said to be fourfold, namely, (1) unity of interest, (2) unity of title, (3) unity of time, and (4) unity of possession.

By unity of interest is meant, that the tenancy of both must be of the same character, that is to say, as tenant in fee, for life, or for years. So that where A. and B. are joint-tenants, A. cannot be tenant in fee and B. only for life. Though if land be granted to A. and B. for their lives and to the heirs of A., A. and B. are joint-tenants of the freehold during their lives, *i.e.* holding jointly during their joint lives, and the survivor holding for the remainder of his life, and A. having the remainder of the fee in severalty.

By unity of title is meant that the estate must be created by one and the same act. A joint-tenancy must be created by purchase, and not by descent or act in law.

By unity of time is meant that the estates of the joint-tenants must be vested at one and the same period. There may be a present estate vested in A. and B., or a remainder

to A. and B. after a particular estate. But if, after a lease for life, the remainder be limited to the heirs of A. and B., and during the continuance of the particular estate A. dies, the remainder of one moiety will be vested in his heir, and, on the death of B., the other moiety will be vested in the heir of B. Then A.'s heir and B.'s heir are not joint-tenants of the remainder, but tenants in common. Yet, where a feoffment was made to the use of A. and such wife as he should afterwards marry for the term of their lives, and A. afterwards married, it was held that the husband and wife had a joint estate, though vested at different times: because the use of the wife's estate was in abeyance and dormant until the marriage, and then had relation back, so as to take effect from the time of the original creation.

The unity of possession has been expressed by the maxim that joint-tenants are seised *per my et per tout*—by the half or moiety, and by all—that is, each of them has an undivided moiety of the whole, and not the whole of a moiety. And, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants nor tenants in common: for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety; the consequence of which is that neither can dispose of any part without the assent of the other, but the whole must remain to the survivor.

Upon the above principles, the following are some of the consequences which ensue. If two joint-tenants make a verbal lease of their land, reserving rent to be paid to one of them, it enures to both, in respect of the joint reversion. If their lessee surrenders his lease to one of them, it also enures to both, because of the unity of estate. For the same reason, livery of seisin made to one joint-tenant enures to both; and the entry or re-entry of one joint-tenant is as effectual in law as if it were the act of both. If two or more joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either; and if they do not both agree within six months, the right of presentation lapses.

In all actions, according to the rules of common law, relating to the joint estate, one joint-tenant cannot sue or be sued without joining the other (or others). So at common law one joint-tenant could not have an action for trespass against another joint-tenant in respect of the land. Nor could he at common law have an action of account, unless he had constituted the other his bailiff or receiver. But, by construction of the Statute of Westminster 2, c. 22, he might have an action of waste; and by 4 Ann. c. 16 joint-tenants may have actions of account against such other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.

From the same principles arises the most important incident of joint-tenancy, namely, the accretion by survivorship: that is to say, when two or more persons are seised of a joint estate, whether of inheritance, for their own lives, or *pur aute vie*, or are jointly possessed of any chattel interest, the entire right upon the decease of any of them remains to the survivors, and at length to the last survivor. For this reason, and because the right of accretion must be mutual, there cannot be a joint-tenancy in the king, or a corporation, and a private person. For, as the king or corporation can never die, there would be no chance of the private person taking the benefit of survivorship.

The condition of joint-tenancy may be destroyed by the act of one or more of the tenants creating a tenancy in severalty, or altering the character of the tenancy to that of tenants in common. This may be done by an act which is inconsistent with any of the unities above mentioned.

(1.) As to the unity in respect of time, as this relates only to the creation of the tenancy, it cannot be affected by subsequent transactions.

(2.) The joint-tenancy may be destroyed by disuniting the possession. As if the joint-tenants agree to part their lands and hold the respective parcels in severalty. By the common law all the tenants might agree to make partition of the lands, but one of them might not compel the others to do so. By the statutes 31 Hen. VIII. c. 1 and

33 Hen. VIII. c. 32, joint-tenants, either of inheritance or of other less estates, were compellable by writ of partition to divide their lands. A concurrent, and much more convenient, jurisdiction to compel partition has long been exercised by the Court of Chancery; and the procedure by writ of partition fell into disuse and (with other old forms of procedure) was finally abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27, s. 36). By the Partition Act, 1868 (31 & 32 Vict. c. 40) the jurisdiction of the Court of Chancery was extended to ordering a sale in lieu of partition. By the Judicature Acts the jurisdiction is now vested in the High Court of Justice, and is ordinarily exercised by the Chancery Division of the Court.

(3.) The joint-tenancy may be destroyed by destroying the unity of title. As if one joint-tenant alienates and conveys his estate to a third person; here the joint-tenancy is severed and converted into a tenancy in common: for the grantee and the remaining joint-tenant hold by different titles, one derived from the original and the other from the subsequent grantor. But a devise of one's share by will is no severance of the joint-tenancy; for no testament takes effect until after the death of the testator, and by such death the right of the survivor, which accrued at the original creation of the estate, and therefore has priority to the other, is already vested.

(4.) The joint-tenancy may also be destroyed by destroying the unity of interest. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the joint-tenancy; though if an estate is originally limited to two for life and after to the heirs of one of them, the freehold remains in jointure without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite to a merger), but branches of one and the same estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure; for it destroys the unity both of title and of interest. And, whenever, or by whatever means, the

jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it. Yet if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship; and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure; for they still preserve their original constituent unities. But where by any act or event different interests are created in the several parts of the estate, or they are held by separate titles, or if merely the possession is separated, so that the tenants have no longer these four indispensable properties—a sameness of interest, undivided possession, a title vesting at one and the same time, and by the same grant—the jointure is instantly dissolved.

3. An estate held in co-parcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by the common law or by particular custom. By the common law—as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females—his daughters, sisters, aunts, cousins, or their representatives: in this case they all inherit, as will be shown in treating of descents hereafter. These co-heirs are then called co-parceners or (briefly) parceners. Co-parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc.

The character of co-parceners is in some respects like that of joint-tenants; they have the same unity of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands, and the entry of one of them may enure as the entry of all. They cannot (by the common law) have an action of trespass against each other; nor could they—differing in that respect from joint-tenants—maintain against each other an action of waste; for they could at all times (without the aid of the statutes of Henry VIII.) put a stop to any waste by writ of partition.

Parceners also differ from joint-tenants in four other points. (1) They always claim by descent, whereas joint-tenants always claim by purchase. And, therefore, no lands can be held in co-parcenary but for an estate of inheritance; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. (2) There is no unity of time necessary to an estate in co-parcenary. For if a man has two daughters to whom his estate descends in co-parcenary, and one dies, the surviving daughter and the heir of the other, or, when both are dead, the heirs of each, are still parceners, the estates vesting in each of them at different times, although it is the same quantity of interest, and held by the same title. (3) Parceners, although they have an unity, have not an entirety of interest. They are each entitled to the whole of a distinct moiety, and there is no *jus accrescendi* on survivorship, for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty. And if one parcener alienes his share, although no partition be made, then the lands are no longer held in co-parcenary, but in common.

There is yet another consideration attending the estate in co-parcenary: that if one of the daughters has had an estate given with her by an ancestor in *frank-marriage*—that is to say, given upon her marriage to her and her husband to the use of the husband and wife and the heirs of their bodies (being a species of estate tail)—if lands descend from the same ancestor to her and her sisters in fee-simple, she and her heirs have no share of them, unless the persons entitled to the lands so given in *frank-marriage* agree to divide them in equal proportions with the rest of the lands so descending. This principle, said to be derived from the law of the Lombards, has been denominated, in English law, “bringing the lands into hotchpot,” a homely metaphor

from the making of a pudding. The species of gift in frank-marriage is now obsolete, having been practically superseded by other forms of settlement; but the notion of bringing property into hotchpot survives in common forms of settlements, as well as in the rules for the distribution of goods (or personal estate) of intestates under the Statute of Distribution (22 & 23 Car. II. c. 10, s. 5). The principle is analogous to the principle of collation of the Roman law, as well as to the division of the "bairns part" of the moveable succession according to Scotch law.

Parceners are so-called, says Littleton, because they may be constrained to make partition. And he mentions many methods of making it, four of which are by consent and one by compulsion. The first is where they agree to divide the lands into equal parts in severalty. The second is where they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age, or otherwise as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But if an advowson descend in co-parcenary, and the sisters cannot agree in the presentation, the eldest and her issue, or her husband, or her assigns, shall present before the younger. The reason given is that the former privilege of priority in choice upon a division arises from an act of her own—the agreement to make partition—and is therefore merely personal; the latter—of presenting to the living—arises from the act of the law, and is annexed, not only to her person, but to her estate also. A third method of partition is where the eldest divides, and then she shall choose last. The fourth method is where the sisters agree to cast lots for their shares. These are the methods by consent. That by compulsion was formerly by a writ of partition sued out by one or more of the parceners against the others; whereupon the sheriff went to the lands and made partition by the verdict of a jury there empanelled, assigning to each of the parceners her part in severalty. In the case of lands held in co-parcenary, this

writ was competent by the common law, and the remedy was extended, as we have seen by the statutes of Henry VIII., to the case of joint-tenants. Since the disuse (and finally the abolition by 3 & 4 Will. c. 27, s. 36) of the writ of partition, the jurisdiction to compel partition (or sale in lieu thereof, under the Partition Act, 1808) has, as in the case of joint-tenants, been exercised by the Court of Chancery, and is now exercised (in the Chancery Division) by the High Court of Justice.

It is here to be noted that there are some things which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, is not to be divided; but, in the case of co-parceners, the eldest sister, if she pleases, shall have them, making to the others a reasonable satisfaction; or if that cannot be, then they shall have the profits of the thing by turns as they take the advowson.

4. Tenants in common are such as hold by several and distinct titles, but by unity of possession. There may in such a tenancy be an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; one's estate may have been vested fifty years, the other's but yesterday. The only unity there is, is that of possession, and this is explained by Littleton by the circumstance that no one can certainly tell which part is his own.

Tenancy in common may be created either by the destruction, so far as relates to the unity of title or interest, of an estate in joint-tenancy or co-parcenary, or by special limitation in a deed. So that, if one of two joint-tenants in fee alienates his estate, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation: and if the former had alienated his estate for the life of the alienee only, they would have different interests, the former joint-tenant having a fee-

simple, and the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common, because they hold different titles, the parcener by descent, the alienee by purchase. So, likewise, if there be a grant to two men or two women, and the heirs of their bodies, the grantees are joint-tenants of the life estate ; but they will have several inheritances, because they cannot possibly have one heir of the two bodies, as might have been the case had the limitation been to a man and a woman and the heirs of their bodies together. In short, whenever an estate in joint-tenancy or co-parcenary is dissolved, so that no partition is made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed ; but here care must be taken not to insert words which imply a joint estate. And the law prefers the construction in favour of joint-tenancy rather than of tenancy in common, because the divisible services issuing from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two to be holden, the one moiety to one and the other moiety to the other, is an estate in common ; and if one grants to another half his land, the grantor and grantee are also tenants in common, because joint-tenants do not take by distinct halves or moieties. But a devise to two persons to hold jointly and severally is said to be a joint-tenancy, because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition ; and an estate given to A. and B., equally to be divided between them, though in deeds it has been said to be a joint-tenancy (for it implies no more than the divisibility annexed by law to the estate), yet in wills it is certainly a tenancy in common, because the deviser may be presumed to have meant what is most beneficial to both the

devisees, though his will is imperfectly expressed. Where a tenancy in common is intended, the most usual and safest way of expressing the intention is to limit the estate to A. and B., to hold (to the use of A. and B.) *as tenants in common, and not as joint-tenants*.

For the purposes of partition, or sale in lieu of partition, the law with respect to tenants in common is the same as in the case of joint-tenants. The partition, by which the several tenants in common hold the several parcels in severalty, of course dissolves the common estate. The estate in common may also be dissolved by uniting all the titles and interest in one tenant, by purchase or otherwise, so that the whole is held in severalty.

CHAPTER XXV.

OF THE TITLE (CONSIDERED GENERALLY) TO LANDS, TENEMENTS, AND HEREDITAMENTS.

A TITLE is thus defined by Sir Edward Coke: *Titulus est justa causa possidendi id quod nostrum est*; that is to say, it is the means whereby the owner of the lands has the just possession of them.

To form a complete title to lands and tenements in possession there are several stages to be considered in order.

1. The mere naked possession may exist without any right to hold and continue the possession; as where one invades the possession of another, and by force or surprise turns him out of the occupation of his lands. Or it may happen that after the death of the ancestor, and before the entry of the heir, or after the death of a particular tenant, and before the entry of the person entitled in remainder or reversion, a stranger contrives to get possession of the vacant land, and holds it against the person who has the right. In all these cases the wrong-doer has a mere naked possession, which the rightful owner may put an end to by such means as the law allows. But in the mean time

the bare possession is *primâ facie* evidence of seisin in fee; so that against those who have no better right it is a perfectly good title; and even against one who has the right by an action in the Courts to recover possession, the adverse possession puts upon him the burden of proof. Further, the bare possession may, by length of time and negligence of him who has the right, by degrees ripen into a perfect and indefeasible title. And without such actual possession no title can be complete.

2. There may be a right of possession in one, who still may not have a perfect title, although the actual possession is, held by another. The person who is disseised by the mere trespass of a stranger is entitled, by law, to enter upon the land, and by lawful means (which are nowhere satisfactorily defined) to turn out the stranger. And mere entry by such a person without actually turning out the intruder had formerly important consequences in preserving his right. But if the disseisor, or other wrong-doer, dies possessed of the land whereof he became seised by his own unlawful act, his heir obtains what has been called an *apparent* right of possession; and, while the right of possession still remains in the person disseised, he must bring an action in order to recover the actual possession. And if he brings his action within the time allowed by law, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession to which he has the right. Yet, if he omits to bring his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession in consequence of the other's negligence.

3. There may be a mere right of property, the *jus proprietatis*, without either possession or even the right of possession; that is to say, a person may have the true ultimate property of the land in himself, but by the intervention of certain circumstances another has obtained the right of possession.

This divorce of the right of possession from the right of property was formerly not infrequent. For instance, if a

person disseised, or turned out of possession of his estate, neglected to pursue his remedy within the time limited by law, by this means the disseisor or his heirs gained the actual right of possession. Still, by the common law the person disseised or his heir had the true right of property remaining in himself; and although his estate was said to be turned into a mere right, he might, by proving such his better right, at length recover the land. Again, if a tenant-in-tail discontinued his estate-tail by alienating the lands to a stranger, and died, here the issue in tail had, by the common law, no right of possession, for the law would presume *primâ facie* that the ancestor would not disinherit his heir, unless he had power to do so; and therefore, as the ancestor had in himself the right of possession, and had transferred the same to a stranger, the law would not permit that possession to be disturbed, unless by showing the absolute right of property to reside in another person. The heir, therefore, in this case had only a mere right, and was strictly held to the proof of it in order to recover the lands (a). Lastly, if by accident, or neglect, or otherwise, judgment is given for either party in a possessory action (that is, an action wherein the right of possession only, and not that of property, is contested), and the other party had in himself the right of property, that would be turned into a mere right: and, upon proof thereof in a subsequent action, denominated a writ of right, he could recover seisin of the lands.

Under the more recent statutory law relating to real property, and particularly having regard to the Real Property Limitation Acts, 1833 and 1874 (3 & 4 Will. IV. c. 27, s. 34; and 37 & 38 Vict. c. 57, s. 9), by which the right of the person who might have brought the possessory action is extinguished by the lapse of the period of limitation, it can now rarely happen that there is a bare right

(a) The above example is retained from Blackstone as an illustration of the way in which the law worked in his time. This effect of a discontinuance could not take place after the 31st December, 1833 (3 & 4 Will. IV. c. 27, s. 39).

of property divorced from the right of possession. For this reason the writ of right has become obsolete; and indeed the prevailing varieties of this writ were expressly abolished by the 36th section of the Real Property Limitation Act, 1833. The possessory action known as ejectment became practically sufficient for all purposes where the legal right to an estate in possession was contested. And under the modern practice the relief commonly asked for in an action of this kind is to recover possession of the land, and a decree for recovery of possession is sufficient for all practical purposes. Such a decree may indeed be accompanied by a declaration of the right; but this is unnecessary in order to recover possession.

Under modern practice, the old distinction between a right of entry, and a right of possession to be enforced by action, is also become of less importance than formerly. By the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27, s. 10), a merely formal entry did not stop the running of the period of limitation (a). And, although at one time the Court of Chancery would have declined to intervene where a mere legal right was in question, the power of granting an injunction in all cases of the continuance of an injury was conferred upon the common law courts by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 79, 82) (b); and under the power conferred by the Judicature Acts to grant an injunction or appoint a receiver where "just and convenient" (36 & 37 Vict. c. 66, s. 25 (8)), an injunction against the continuance of a wrongful possession may, if promptly applied for, be granted in a case where the assertion of the right of entry would be likely to lead to a breach of the peace.

4. Lastly, a complete title to lands, tenements, and hereditaments in possession exists where the right of

(a) See *Doe d. Baker v. Coombes* (1850), 9 C. B. 714 (16 R. C. 337).

(b) It is curious that it was left for the Master of the Rolls (Sir G. Jessel), so late as the year 1882, to point out the application of the Common Law Procedure Act, 1854, to interpret the jurisdiction of the Court in regard to injunctions under the Judicature Act, 1873 (*Quartz Hill, etc., Mining Co. v. Beall* (1882), 20 Ch D. 501; 51 L. J. Ch. 874).

possession, as well as the actual possession, is joined with the right of property.

CHAPTER XXVI.

OF TITLE (TO LANDS, TENEMENTS, AND HEREDITA- MENTS) BY DESCENT.

THERE are two ways in which the title to lands became transmitted from one person to another. These are *descent*, where the title becomes transmitted by the single operation of law; and *purchase*, where by the act or agreement of one or both of those persons.

Descent is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation, as his heir-at-law. An heir is he upon whom the law casts the estate immediately upon the death of the ancestor; and an estate so descending to the heir is called the inheritance.

Strictly speaking, there is now no such title in English law as title by descent. The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), fully cited in a subsequent chapter relating to administration of the estate of a deceased (p. 217, *post*), creates a paramount title in the executor or administrator, who holds as trustee for the purposes stated in the Act, and subject thereto upon trust to convey to the beneficial owner who is determined by the rules of law already existing. For the purposes of this chapter it is convenient to employ the old expressions relating to inheritance and title by descent.

The law of inheritance in fee-simple is of primary importance; and is referred to expressly or implicitly in all rules relating to purchases, whereby the legal course of descents is broken and altered. Thus a gift in tail, or to a man and the heirs of his body, creates a limitation which cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. It may be readily understood that this is an estate confined in its

devolution to such heirs only of the donee as have sprung or shall spring from his body; but who those heirs are, whether all his children, both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; to be informed upon this point, we must look to the standing law of descents in fee-simple.

The descent of an estate in fee-simple will now be considered, apart from particular customs and irrespective of the rules relating to estate tail; and first it is necessary to explain the notion of consanguinity or relation by blood.

Consanguinity has been defined as *vinculum personarum ab eodem stipite descendantium*, the relation of persons descended from the same stock or common ancestor.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other; as between J. S., the *præpositus*, in the table of consanguinity, and his father, grandfather, great-grandfather, and so upwards in the ascending line; or between J. S. and his son, grandson, great-grandson, and so downwards in the direct descending line. The father of J. S. is related to him in the first degree; so likewise is the son: his grandsire and grandson in the second degree, and so on.

Collateral relations are such as descend from the same common stock or ancestor, who is said to be the *stirps* or root of the common stock. As if J. S. has two sons, who have each a numerous issue; both these issues are descended from J. S. as their common ancestor; and they are collateral kinsmen to each other.

Descents are traced according to rules founded on the custom of the realm, as modified by statute. By the common law the descent of land was traced from the person last seised; but by the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106), the descent in "land" (which by the Act is defined as including all hereditaments) is traced from the last "purchaser," that is to say, the person who last acquired the land otherwise than by descent, or than by other title (such as partition), by the effect of which the land

has become descendible in the same manner as other land acquired by descent. To aid the definition of "purchaser," it is enacted that the person last entitled to the land shall be considered to have been the purchaser, unless it shall be proved that he inherited it; and in like manner the last person from whom the land shall be proved to have been inherited shall, in every case, be considered to have been the purchaser, unless it shall be proved that he inherited the same. In order, further, to define the term "purchaser," it is enacted that a person who takes in the character of heir to X. a property devised by X. to his heir or conveyed by X. to himself and his heirs, or shall have taken in the character of heir of the body under the limitations of an entail, shall be considered to have acquired the land as a purchaser.

Keeping in mind, then, that descent is traced from the last purchaser as the *præpositus*, or stock of descent, the order of inheritance, by the common law and the statute combined, is as follows:—

I. The inheritance in the first place descends lineally to the issue of the purchaser *in infinitum*.

II. The male issue is admitted before the female.

III. Among sons primogeniture prevails; but daughters inherit together.

IV. The lineal descendants *in infinitum* of any person deceased represent their ancestor.

Therefore the child (or grandchild whose parent is deceased) of the eldest son succeeds before the younger son, and so on *in infinitum*. And if there be two daughters, X. and Y., of J. S. (the *præpositus*), and X. dies, leaving six daughters but no son; and then J. S. dies without other issue, these six daughters of X. take among them the same share as their mother X. would have had, that is, a moiety of the lands of J. S. in co-parcenary; so that upon partition the land will be divided into twelve parts, Y., the surviving daughter of J. S., taking six parts, and her six nieces, the surviving daughters of X., one part apiece.

This taking by representation is called succession *per stirpes*; since all the branches inherit the same share that their root, whom they represent, would have done.

By the succession *per stirpes*, combined with the preference given by the law, first to the male issue and then to the first-born among males, the rule of descent is kept uniform and steady. The issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mother (if living) would have done the same; and among these several issues or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain as would have obtained at the first among the roots themselves. As if a man has two sons, A. and B., and A. dies leaving two sons, and then the grandfather dies; now the elder son of A. succeeds to the whole of his grandfather's estate; and if A. had left only daughters, they should have succeeded also to equal moieties of the whole in exclusion of B. and his issue. But if a man has only three daughters, C., D., and E., and C. dies leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C. succeeds to one third, in exclusion of the younger; the two daughters of D. to another third in co-parcenary; and the son of E. to the remaining third, in exclusion of his elder sister.

The right of representation in the succession to land does not seem to have been thoroughly established in England until the reign of Henry III., when we find it so laid down by Bracton; and it has since remained undisputed. Doubtless the so-called usurping uncles who figure in history as well as in fiction, had always some colour for their claim. They were a degree nearer in blood, and might be presumed to be better able to perform the feudal services.

V. Failing issue of the purchaser, the inheritance devolves upon the nearest lineal ancestor (in the male line)

then living; unless there be issue then alive of a nearer lineal ancestor who is dead.

Thus the father of the purchaser, if alive, succeeds in preference to brothers or sisters; and the paternal grandfather, if alive, succeeds in preference to uncles, aunts, or cousins. This rule is introduced by the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106, s. 6), which applies to titles by inheritance arising upon the death of any person dying in or after the year 1834. By the former law a direct ancestor of the person last seised was excluded; and there was, under feudal conditions, probably a reason for this in the presumption that such an ancestor had already given up the seisin, or would not be so capable as a younger collateral of performing the services.

VI. By the Inheritance Act, 1833, the descent of collaterals is traced through the common ancestor. Where an ancestor on whom, if living, the inheritance would have devolved according to the last rule, is dead, leaving issue, the inheritance devolves upon such issue according to the rules before laid down with respect to the issue of the purchaser. But in the succession of collaterals traced through a male ancestor, those by the whole blood succeed in preference to relations in the same degree of the half-blood. This condition relating to the half-blood is a modification of the old law by which the relations by the half-blood of the person last seised were totally excluded.

VII. Where there is a failure of male paternal ancestors of the purchaser, and their issue, the mother of a paternal ancestor and her issue may inherit; the mother of the more remote male paternal ancestor and her issue being preferred to the mother of a less remote male paternal ancestor and her issue. Such issue, which is necessarily of the half-blood to the purchaser, succeed next in order to the female ancestor whom they represent, and who, if alive, would have succeeded.

CHAPTER XXVII.

OF TITLE (TO LANDS, ETC.) BY PURCHASE.

IN treating of title by descent, it has been necessary to some extent to anticipate the description of title by purchase; only it is to be observed that the "purchaser," as defined by the Inheritance Act, 1833, includes some persons who would not, according to the common-law acceptance of the term, be regarded as purchasers.

The legal meaning of "purchase" differs from the popular notion of purchase, which implies that the subject is obtained by way of bargain and sale for money. The legal notion of "purchase" is wider than this. Purchase is defined by Littleton as "the possession of lands and tenements which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred." So that if I give land freely to another, he is in the eye of the law a purchaser, for by consenting to the gift he comes within the definition.

A man who has his father's estate settled upon him as an heir of the body to his father (with limitations over) is also a purchaser; for he takes, *per formam doni*, another estate than the law of descents would have given him. Such a man is also a purchaser within the meaning of the Inheritance Act, 1833. And if the ancestor devises his estate to his heir-at-law by will, with other limitations, or in any other shape than the law would direct, such heir will also take by purchase. By the Limitations Act, 1833, such an heir would be a purchaser, although there were no other limitations; but if the heir takes neither a greater nor a less estate by the devise than he would have done without it, he is for any other purpose than for succession, according to the Inheritance Act, regarded as taking by descent, and this although his estate is charged with the ancestor's incumbrances. If a remainder be limited to the heirs of S., here S. himself takes nothing; but if he dies during the continuance of the particular estate, his heirs take as

purchasers. But if an estate be limited to A. for life, remainder to his right heirs in fee, his heirs take by descent ; for such a limitation is the same thing as a gift to A. and his heirs ; and the word “ heirs ” is regarded as a word of limitation merely.

The word purchase, in English law, is equivalent to what, among the Norman jurists (*a*), was called, and in Scotch law is still called, “ *Conquest*.” In Scotch law, the rules of succession in conquest, as distinguished from heritage, were peculiar. But by the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94, s. 37), the distinction was abolished with respect to all successions opening after the 1st October, 1874.

The distinction between lands acquired by purchase and lands acquired by descent had formerly two important effects. 1. The rules of inheritance were modified by a condition that the person who inherited should be of the blood of the first purchaser ; and this, by a fiction not satisfactorily explained, was supposed to account for the exclusion of the half-blood in collateral succession. The importance of “ purchase ” as defined by the Inheritance Act, 1833, in the modern rules of succession, has already been made sufficiently clear. 2. According to the former law, an estate taken by purchase did not make the heir answerable for the debts of the ancestor. But by various statutes, and ultimately by the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104), and the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), the whole estate of every deceased person is made assets to be applied, in equity, for the payment, *pari passu*, of all his creditors.

Title by purchase includes the following methods of acquiring a title to estates in lands, etc.:—1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation.

(*a*) Blackstone observes that William “ the Conqueror ” was so called because, in this senso he acquired the crown by conquest.

1. *TITLE (TO LANDS, ETC.) BY ESCHEAT.*

Escheat was one of the consequences of feudal tenure. The word is of Norman derivation, and implies the notion of chance or accident. The particular accident on which escheat arises, is that, on the opening of a succession by the death (according to the old law) of the person seised, there is no person related to him by blood so as to be capable of inheriting. The principal causes of the failure of such relations by blood were formerly these: (1) bastardy; (2) alienage; (3) attainder of an ancestor.

1. A bastard cannot inherit; nor can any, except his own issue, inherit from him.

2. An alien could not by the common law inherit lands; nor, by the common law, could he acquire land by purchase; so it would be superfluous to say that land could not be inherited from him. The importance of this disability of aliens has been much diminished, and at length abolished, by statutes. By the Acts 7 Anne c. 5, 4 Geo. II. c. 21, and Geo. III. c. 21, the *status* of natural-born British subjects was conferred on the children and grandchildren, born abroad, by natural-born British subjects. And by the Naturalization Act, 1870 (33 & 34 Vict. c. 14, s. 2), which applies to all successions arising after the 12th of May, 1870, real and personal property of every description may be taken, acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born British subject.

3. By attainder for treason or any other felony, the blood of the person attainted formerly became corrupted, so that no inheritable relationship could be traced through such a person (*a*). But by the Inheritance Act, 1833, the attainder of a person through whom the descent has to be traced did not prevent the transmission by inheritance; unless, in consequence of the attainder, the land had been escheated before the 1st of January, 1834. And by the Forfeiture Act, 1870, from and after the passing of the Act (4th July,

(*a*) There was an exception in gavelkind lands, where the adage, "The father to the bough, the son to the plough," prevailed.

1870), the consequence of escheat following on attainder or corruption of blood was abolished.

The effect of an escheat is, that for want of an heir to perform the services, the lord of the fee is entitled to enter and possess the land as if no fee had been granted. When the estate has escheated to the Crown as the immediate lord of the fee, the Crown is empowered to make a re-grant with a wide discretion as to the persons presumably entitled to the benefit (see 59 Geo. III. c. 94, and Acts there recited).

An exception to the law of escheat is where lands are held by a corporation. If the corporation is dissolved, there can be no heir; but the land goes to the donor or his heirs by reversion, and not to the lord by escheat.

2. TITLE TO LAND BY OCCUPANCY.

Occupancy is the taking possession of those things which before belonged to nobody. The right of occupancy, so far as it concerns real property, has been confined by the laws of England within a very narrow compass, and extended only to a single instance, namely, where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another, and died during the life of the *cestuy qui vie*, or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession so long as the *cestuy qui vie* lived by right of occupancy. In this case the estate did not revert to the grantor, for he had parted with all his interest, so long as the *cestuy qui vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the entire fee; it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in the grant; nor could it (by the common law) vest in his executors, for no executors could succeed to a freehold. Belonging, therefore, to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seised and appropriated by the first person that could enter upon

it during the life of the *cestuy qui vie*, under the name of an occupant.

Such was the case of what was called "common occupant." This effect of common occupancy was, however, abolished by the statutes 29 Car. II. c. 3 and 14 Geo. II. c. 20, which enacted that the estate which was the subject of common occupancy should be assets for the payment of the debts of the deceased grantee, and that the surplus should go in a course of distribution like a chattel interest. But if the estate had been granted to A. and his heirs during the life of another, then on A.'s decease his heir was entitled to enter and hold as a *special occupant* during the life of the *cestuy qui vie*. The law as to the devolution of such estates on and after the 1st of January, 1838, is regulated by the Wills Act, 1837 (7 Will. IV. and 1 Vict. c. 26, ss. 3, 6), which enacts that an estate *pur autre vie*, of whatever tenure, shall be devisable by will, and that where no disposition is made of an estate *pur autre vie* of a freehold nature, it shall be chargeable in the hands of the heir, if it comes to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and that if there be no special occupant, the estate *pur autre vie* shall go to the executor or administrator of the person who had the estate by virtue of the grant.

The case of the death of a tenant *pur autre vie* appears to have been the only case in which the law allowed a title to lands to be acquired by mere occupancy. In the case of a sole corporation, as a parson of a church dying or resigning, although there is no actual owner until a successor is appointed, yet there is a potential ownership subsisting in contemplation of law, and when a successor is appointed, his title relates back to the time when the vacancy commenced. And where a tenant in fee of lands dies intestate and without heirs, the title vests by escheat in the Crown or subordinate lord of the fee, as already explained.

In those cases where lands are newly created by the rising of land in the bed of the sea or a tidal river, although by the civil law and the laws of some other countries

a title may be acquired by occupancy, there is by the law of England a title already vested in the Crown or the grantee of the Crown. And where land is cast up by imperceptible alluvion or by the gradual and imperceptible recession of the water, the accretion goes to the owner of the adjoining land.

3. TITLE (TO LAND, ETC.) BY PRESCRIPTION.

Although the mere possession of land does not itself constitute a title; and although, by the theory of the common law, no length of adverse possession could divest the title of the true owner except so far as it shifted the burden of proof, the law was altered by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27, s. 34), which extinguishes the right of the person who (not being under disability) has not pursued his right for the statutory period of twenty years, reduced to twelve years by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). So that it may now be said that the mere possession may grow into a title, by the lapse of the period of limitation, which thus in effect constitutes in the possessor a title by prescription.

In regard to incorporeal hereditaments, such as rights of way, of common, etc., it has always been held possible to acquire them by prescription, the continual or sufficiently frequent exercise of such rights for a length of time being sufficient presumptive evidence of a grant, which is the appropriate title. By the common law the length of time required was such that there was no memory to the contrary. But by degrees shorter periods of time have been allowed to raise the presumption; and in some important classes of rights these have been fixed by statute.

Prescription may be claimed in what has been called a *que estate*, that is in the right of the claimant and those whose estate he holds; or for a right *in gross* where a man prescribes in himself and his ancestors. Most prescriptive rights are claimed in respect of an estate in some land,

Thus a right of common appurtenant (*a*) is usually claimed as having been exercised from time immemorial by the owners or occupiers of a certain tenement. A right of way may be claimed under the Prescription Act, 1832 (2 & 3 Will. IV. c. 71, s. 2), by virtue of the uninterrupted user for twenty years. The user must be continuous, and as of right, and any cessation of the user must be such as not to exclude the inference of enjoyment as of right (*b*). So the right to the access and use of light to and for a building may be claimed by uninterrupted enjoyment for twenty years (sect. 3 of same statute). The right of support to buildings from the adjoining land is also a right in the nature of an easement capable of being acquired by manifest user for twenty years (*c*). The right of the owner of land in its natural state to support from the adjoining land is always a right incident to the property, and requires no aid from prescription.

Prescription is, in English law, regarded as only a presumption of a lost grant; and therefore cannot support a right which cannot be made good by grant. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers: for, as such a claim could never have been good for any grant, it cannot be good by prescription.

It is also a rule that rights which are properly matter of record cannot be prescribed for. So the Royal franchises of deodands (*d*), felons goods (*d*), etc., the title to which was

(*a*) Common appurtenant has been distinguished from common appendant—a right which is part and parcel of the tenement as originally granted. Common appendant, in ancient tenements, usually consisted of a right of pasturage for the beasts of plough employed upon the tillage land. Common appurtenant is that which is annexed to the estate by usage. The difference in effect is that if a commoner purchase part of the land in which he has common appurtenant, this extinguishes his right of common; whereas if the common is appendant the rights would be apportionable. It is not, however, always easy to show, in a particular case, whether the common is appurtenant or appendant. For instance, in the case of a freehold tenement, the evidence of user which would be sufficient to prove common of pasture appurtenant would be strong presumptive evidence of common appendant.

(*b*) *Hollins v. Verney* (C. A. 1884), 13 Q. B. D. 304 (10 R. C. 80).

(*c*) *Dalton v. Angus* (H. L. 1881), 6 App. Cas. 740 (10 R. C. 98).

(*d*) Deodand was abolished by the Act 9 & 10 Vict. c. 62; and forfeiture

not completed without the inquisition of a jury and the entry of the verdict upon record, could not be claimed by prescription. But other Royal franchises, as treasure-trove, waifs, estrays, and the like, which arise from contingencies which are not matters of record, may be claimed by prescription.

4. TITLE (TO LAND, ETC.) BY FORFEITURE.

The causes of forfeiture are much diminished by modern legislation.

Forfeiture formerly took place upon conviction of treason or felony. By the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), forfeiture upon treason or felony was abolished, under the proviso that the abolition should not affect the law of forfeiture consequent upon outlawry.

Under the statutes of Mortmain, which are consolidated and amended by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), land conveyed to or for the benefit of a corporation in mortmain, otherwise than by Royal licence or by statute, is liable to be forfeited to the Crown or to the mesne lord, if any.

Formerly an estate might be forfeited through the owner making a feoffment for a greater estate than he had. But this consequence of a feoffment was abolished by the Real Property Act, 1845 (8 & 9 Vict. c. 106), which enacted, by sect. 4, that a feoffment made after the 1st of October, 1845, should not have any tortious operation.

A kind of forfeiture occurs where the right of presentation to a benefice is not exercised in due time. The right is then said to lapse. Where the patron does not present within six months after a vacancy, the right lapses to the bishop, likewise on his default to the archbishop, and lastly to the King. The right of presentation to a living is also forfeited by *simony*, and vested *pro hac vice* in the Crown (a).

(except upon outlawry) was abolished by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23).

(a) Statute 31 Eliz. c. 6.

C.

O

Simony is defined as the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. Questions whether certain acts amounted to simony have given rise to fine distinctions.

Another cause of forfeiture is by breach or non-performance of a condition annexed to the estate, either expressly by deed at its original creation, or by implication of law, as where a gift is made of an office, which may be forfeited by misuser. So in some copyhold tenements, forfeiture may be incurred by breach of the custom of the manor upon presentment of the homage.

An effect analogous to forfeiture ensues upon bankruptcy. Where a debtor is adjudicated bankrupt his estate becomes vested in the trustee; and the title of the trustee relates back to the act of bankruptcy on which the adjudication is founded. The title of the trustee in whom the estate, both real and personal, becomes vested on bankruptcy, will be more particularly considered in treating of the title to personal estate (*a*).

5. OF TITLE (TO LAND, ETC.) BY ALIENATION.

Title by alienation is not of equal antiquity with title by descent. By the feudal law a feud could not be transferred by a feudatory to another without the consent of the lord. Nor could the feudatory subject the land to payment of his debts, for that would have frustrated the feudal restraint upon alienation. Nor, even with the consent of the lord, could he alienate the estate without the consent of his own next apparent or presumptive heir. Nor could the lord alienate his signiory without the consent of his vassal. These restraints upon alienation have gradually been removed by various statutes.

The only restraints on alienation which are now effectual are those which relate to the personal disability of the parties. Such disability, total or partial, may arise from (1) unsoundness of mind, (2) infancy, (3) coverture.

(*a*) See p. 269, *infra*.

1. There has been much fluctuation of legal opinion as to the incapacity caused by unsoundness of mind. By the common law there were some acts of such high effect in law that they could not be avoided on the ground of insanity. Such was a feoffment, which took effect by public and solemn acts indicating the delivery of possession. But as a feoffment must now, since the Real Property Act, 1845 (8 & 9 Vict. c. 106) be evidenced by deed, no doubt the effect of the feoffment may be avoided in the same way as that of any other deed. Also a conveyance, which was matter of record, such as a fine or recovery, was said not to be voidable. But fines and recoveries are now abolished, and conveyances, which are matters of record, are not frequent in practice. And it was also at one time held that a man could not himself have relief against his own acts done, when he was *non compos mentis*, although his representatives after his death might avoid such acts.

But it may now be assumed generally that the legal acts of a person who is, by reason of unsoundness of mind, not a rational and free agent in the matter in question, may be avoided by appropriate proceedings in a court of justice.

Under the powers of the statutes relating to lunacy, commissioners, including a selection of judges of the Supreme Court, are entrusted with the persons and estates of idiots and lunatics. Where the commissioners have held an inquiry, and, by themselves or the verdict of a jury, the lunatic is so found, a committee of the estate (as well as a committee of the person) is appointed, and the management of the estate entirely taken out of the lunatic's hands. The Court of Chancery had also exercised a jurisdiction as to the guardianship and maintenance of a lunatic not so found by inquisition, and this jurisdiction is under the Judicature Acts vested in the members of the Court of Appeal and the Lord Chancellor.

2. Infants are also so far protected by law that conveyances made by them are generally voidable. Further, by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), the contracts of an infant which before were voidable were made void.

3. The disability of a married woman was formerly such that by common law no conveyance by her was valid without her husband's concurrence. But if property was settled to her separate use (which was generally done by the intervention of a trustee), she was entitled, by the aid of the doctrines of equity, to dispose of it. And now, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), a married woman is capable of disposing of all her property, as separate property, even without the intervention of a trustee. She may still, however, have property settled by a trust to her separate use without power of anticipation; and such a restraint or anticipation is effectual during the coverture.

CHAPTER XXVIII.

OF THE VARIOUS ASSURANCES OR MODES OF ALIENATION (OF LANDS, ETC.).

THE modes of alienation or conveyance of lands, tenements, and hereditaments may be classed, having regard to the assurances or legal evidence by which the transactions are substantiated, as follows: (1) conveyance by deed, including conveyances by matter of record; (2) by special custom; and (3) by devise.

(1) *CONVEYANCE BY DEED.*

For a conveyance immediately to carry the legal estate in lands, tenements, or hereditaments, a deed is generally necessary.

In order to explain the essentials of a deed it is convenient to look at the form of a deed as settled by long usage, irrespective of modern statutes. For although, in modern practice, the form (which may be referred to as

the common-law form) of a deed of conveyance has been modified, and the meaning of some clauses obscured, the essentials, as now to be explained, are still to be found (either expressly or by implication) in every deed of conveyance of lands, tenements, or hereditaments.

A deed is a writing upon parchment or paper sealed and delivered by the parties. In practice a deed is invariably signed or subscribed, as well as sealed, by each of the parties who executes it; but the legal effect of signing by subscription of the party (unless, under the Statute of Frauds, the subscription be considered necessary in addition to sealing) is merely to record the essential fact of the sealing and delivery by that party. Where a man has sealed and delivered a deed, he is estopped by it; that is to say, he is not permitted to aver or prove anything to contradict the deed.

A deed may, in point of form, be a deed-poll or an indenture. Where only one person is to execute or be bound by the deed, or where two or more persons are joined in the same obligation or grant without any reciprocal obligation or grant from any other person, the deed is commonly made in the form of a deed-poll. Where more than one party is to execute, or be bound, it is made in the form of an indenture. These terms have been employed from the circumstance that the deed-poll used to be made on parchment cut smoothly at the top; whereas one edge (generally the top) of an indenture was cut in a zigzag (*a*), indicating that it had been cut from a larger piece of parchment; and that the edge of another piece, upon which a deed in identical terms was engrossed and intended to be executed by one or more other parties, would be found to fit into this zigzag edge. In a deed-poll it has been usual to commence with some such words as: "Know all men by these presents that I, A. B., etc. [name and description of the grantor or obligor], do hereby grant, etc.," or otherwise according to the intention of the deed; or, "To

(a) By the Real Property Act, 1845, s. 5, a deed purporting to be an indenture has the effect of an indenture, although not actually indented

all to whom these presents shall come, A. B., etc. [name and description of the grantor or obligor], sends greetings." Then follow the terms expressing the intention. An indenture usually commences thus: "This indenture made this day of 19 between A. B., etc. [names and descriptions of parties] Witnesseth, etc."

To render a deed effectual the following are the essentials in point of substance.

1. The parties executing and becoming bound by the deed must, of course, be legally capable to act or bind themselves according to the objects of the deed; and, in a deed of conveyance, there must be a thing granted which is sufficiently described, as well as, in every deed, the name and sufficient description of the person to whom the grant is made or obligation contracted. In every grant, therefore, there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

2. The deed must be founded upon good consideration. If no consideration is stated in the deed, the sealing by the party granting is *primâ facie* evidence that the grant is founded on good consideration. But if an illegal consideration appear on the face of the deed, it is *ipso facto* void; or if the grant is proved to have been procured by a fraud, either directed against the grantor himself or against third parties, the deed may be set aside in a Court of Equity or Bankruptcy.

Good consideration is not necessarily the same as valuable consideration. For a gift or voluntary deed made with deliberate intention, with no other motive than affection or favour to the grantee—is in law treated as made for good consideration. There has been, however, a statutory presumption of fraud in favour of creditors (by the Act 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5) owing to the absence of valuable consideration, where the transaction is such as would necessarily defeat creditors. The presumption has been incorporated into the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 4 (1) (b), whereby a debtor commits an act of bankruptcy if (*inter alia*) he makes a fraudulent

conveyance, gift, or transfer of his property or any part thereof.

A still more cogent statutory presumption of fraud was enacted by the statute 27 Eliz. c. 4 (according to the construction of the statute which has prevailed in the Courts) in favour of a subsequent purchaser for valuable consideration. But much of the law laid down on this subject has been now rendered obsolete by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which, in effect, enacts that a person who, on or after the 29th of June, 1893, becomes a purchaser for value of land, cannot (under the Act of 27 Eliz.) avoid a previous voluntary settlement made *bonâ fide* and without fraudulent intent.

3. The deed must (as already mentioned) be written, or printed, on paper or parchment; but it may be in any language, and, in order to be produced as evidence in Court, it must be duly stamped. At one time many conveyances were made by parol, without writing, but by the Statute of Frauds (29 Car. II. c. 3) all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other force or effect. The statute excepts leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during the term amounts to two-thirds at least of the full improved annual value of the thing demised. Under this Act a feoffment, on which livery of seisin was duly made, was an effectual conveyance, if made in writing or signed by the party or his agent duly authorised by writing; but by the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 4), a feoffment, other than a feoffment made under a custom by an infant, is void at law unless made by deed.

4. The matter written must be set forth in words sufficient to specify what is intended, and legally to bind the parties. The usual terms of a deed, as settled by long practice, are here set forth, following their order as stated by Blackstone, and noting the changes made in the usual modern practice. First, the *premises* set forth the number and names of the parties, with their additions or titles, followed by a recital of such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the transaction is founded, and then follows the clause in which the grantor, the grantee, and the thing granted are clearly expressed. The date of the deed is now usually mentioned in the premises, but this is not essential. Next (and secondly) follows the *habendum*, commencing in old deeds with the Latin word translated "To have," followed by the words "unto and (by reason of the Statute of Uses) to the use of, etc., in fee-simple"—(or otherwise, as the case may be)(a). Next (and thirdly) in order, in old deeds, came the *tenendas*—"tenendas prædictas terras," etc., specifying the tenure. All tenures being now reduced to free and common socage, the tenure is now never specified; and the only trace of the clause in modern deeds is the addition of the words "to hold"—*i.e.* "to have and to hold—in the *habendum* clause. Next (and fourthly) follow the terms of stipulation, if any, upon which the grant is made; the first of which is the *reddendo*, or reservation, whereby the grantor creates or reserves something to

(a) It is observed by Blackstone that the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. Thus, if a grant be made to "A. and the heirs of his body" in the premises, *habendum* "to him and his heirs for ever," here A. has an estate tail and a fee-simple expectant thereon. But if the grant in the premises is made "to A. and his heirs," *habendum* "to him for life," the *habendum* would be void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not be afterwards divested by it. The language of Blackstone is criticised by Mr. Challis; and is perhaps not strictly accurate. But this is now of little importance, for where the conveyance operates, as it generally does, under the Statute of Uses, there is nothing to prevent the grant being made in the premises "to A. and his heirs," *habendum* "to A. and his heirs" to the use of A. for life, "remainder to the use, etc.," where A. will take a life estate only.

himself out of what he had before granted. As “rendering, therefore, yearly the sum of ten shillings, or a peppercorn, or two days’ ploughing, or the like.” Under the pure feudal system this render (*redditus*), return, or rent, consisted in chivalry, principally of military services; in villenage of servile offices; and in socage it usually consists of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to a stranger to the deed. But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee. Fifthly, a grant may be made upon a *condition*, on the happening of which the estate granted may be defeated, such as the usual proviso for redemption in a mortgage deed. Sixthly, may follow the warranty whereby the grantor doth for himself and his heirs warrants to the grantee the estate so granted. The warranty had important effects in former times, especially by the use made of it in evading the statute *de donis* by a common recovery (*a*). But for any purpose which the warranty may now serve, the covenants for title, which in conveyances made since the Conveyancing Act, 1881, are usually expressed in the premises by the short forms (*b*) there provided, are generally sufficient. Next to the clause of warranty (if any) follow the covenants, whereby either party may bind himself to answer for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he has a right to convey; or for the grantee’s quiet enjoyment, or the like (covenants for title, etc., above referred to); or production and safe custody of title deeds (for which a short form is provided by the Conveyancing Act, 1881); the grantee may covenant to pay his rent, or keep the premises in repair, etc. The benefit of the covenants

(a) See p. 130, *et seq.*, *supra*.

(b) Such as where a person conveys and is expressed to convey “as beneficial owner,” “as settlor,” “as trustee or mortgagee,” etc.

implied by the Conveyancing Act, 1881, is by the Act, sect. 7 (6), annexed to the estate of the covenantor, and is capable of being enforced by every person in whom that estate or interest is from time to time vested.

Lastly, comes the conclusion, which mentions the execution and date of the deed. It is usual now, in this clause, to mention the date by reference to a date already given in the premises. Thus:—"In witness whereof the said parties have hereunto set their hands and seals the day and year above written." The mention of the date is, however, not essential, nor will it invalidate the deed if a false or impossible date is given, provided the real date of the deed being delivered can be proved.

5. The fifth essential (according to Blackstone) is the reading of the deed. This is said to be necessary wherever any of the parties desire it; and if it is not done on his request, the deed is void as to him. But when a party has signed and sealed the deed, there is necessarily a very strong presumption against him that he has done so with full knowledge of its purport and effect; and to rebut this he would have to make out what in effect would be a fraud upon him.

6. It is requisite that the party whose deed it is should seal, and, for the purposes above mentioned, that he should sign the deed. The use of seals as a solemnity is extremely ancient, although, as Blackstone observes, the usage in England in the Saxon period was to authenticate documents by signature without seal; persons who could write subscribing their names, and those who could not making their mark by a cross. The practice of using seals alone was introduced into England by the Normans; and in the attestation clause the expression "sealed and delivered," without mention of signing, is still a common form. The Statute of Frauds (29 Car. II. c. 3) revived the Saxon custom of signing, and the practice of signing as well as sealing has since become universal; although, as already mentioned, it has been doubted whether the sealing alone is not a sufficient signature to satisfy the statute.

7. A seventh requisite to a good deed is that it be delivered by the party himself or his certain attorney. A deed takes effect only from the delivery: for, if the date expressed in the deed be false or impossible, the true date is ascertained by proof of the date of delivery. A delivery may be either absolute, that is to the party or grantee himself, or to his agent unconditionally; or to a third person, to hold on behalf of the grantor, until some condition be performed on the part of the grantee. A document delivered conditionally has been termed an *escrow*, meaning that it is regarded as a mere scroll or writing, which is not to take effect as a deed until the condition be performed; and then it becomes a deed to all intents and purposes.

8. Lastly, it is the general practice, and an essential in some deeds, that the deed should be executed in presence of and attested by one or more witnesses. This is, speaking generally, required rather for preserving the evidence than as constituting an essential solemnity. There are, however, many deeds to which the attestation by witnesses is essential; for instance, in deeds executing a power, where the instrument creating the power prescribes it; or where it is prescribed by statute. In Scotland the subscription of witnesses to attest the subscription by the grantor of a deed is an essential solemnity.

Having considered the essentials to a valid deed, it remains to note that a deed, although valid originally, may become void by the erasure, interlining, or alteration in any material part; by tearing off or destroying the seal; or by delivering up the deed to be cancelled. A deed may also in whole or in part be set aside by the Court (exercising the jurisdiction of the old Court of Chancery) on the ground of fraud or mistake.

It has been observed that to carry the legal estate in lands, tenements, and hereditaments a deed is generally necessary. Before the Real Property Act, 1845 (8 & 9 Vict. c. 106), there were various kinds of conveyances that might have been made without deed.

Of these the most important was a feoffment, which was

the appropriate mode of conveyance of a freehold estate in land in possession; and, since a feoffment is, subject to the condition imposed by the above-mentioned Act, still a competent mode of conveyance, it seems necessary to explain the *modus operandi*.

A feoffment, at common law, might consist in nothing more than the livery of the seisin: that is to say, a delivery in a public and formal manner of the possession of the lands with the intent to convey an estate in them. This ceremony was properly performed on the land itself; and, in order that the ceremony might be effectual to give a title, it was necessary that (with the exception of a lessee for years who assented to the livery, and of course the feoffor himself) no person having or claiming any estate or possession, nor representing any one who has or claims any estate or possession, should be present (*a*). This was sometimes called livery in deed. Another mode of giving livery of seisin, which held good under certain conditions, was called livery *in law*; where the livery was not made on the land, but in sight of it only, the feoffor saying to the feoffee words to this effect: "I give you yonder land, enter and take possession." Here, if the feoffee entered during the lifetime of the feoffor, it is a good livery, but not otherwise, unless he dared not enter for fear of his life or bodily harm; and then his continual claim made yearly, in due form of law, sufficed without entry.

The formal delivery of possession, as above described, was sufficient, by the presumable intent, to confer upon the person receiving the possession the estate during his life: but the delivery of possession was generally accompanied by an express declaration, which might be oral merely, of the estate to be had by the person receiving the possession and the tenure upon which the lands were to be held, with any other conditions appropriate to the transaction.

By the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, it was enacted that a feoffment, made after the 1st of October, 1845, other than a feoffment made under a

(*a*) See Challis at p. 323 (first edit.).

custom by an infant, shall be void at law, unless evidenced by deed. The exception applies to the custom of gavel-kind and similar customs, under which lands in the county of Kent generally, and some lands outside that county, are held. An incident of this custom is, that an infant, above the age of fifteen years, might dispose of his estate by feoffment. But it seems that, under the Statute of Frauds, the feoffment would have to be put in writing and signed by the feoffor or his agent thereunto lawfully authorised by writing.

It was by the second section of the Real Property Act, 1845 (8 & 9 Vict.c. 106), enacted that after the 1st of October, 1845, "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." A deed of grant was then already the appropriate method of conveying *incorporeal hereditaments*, as well as (or including in the expression "incorporeal hereditaments") estates in land of which the immediate freehold was vested in another. And as soon as this mode of conveyance was applied to estates which were formerly conveyed by livery of seisin, and since a deed had now become necessary at all events, the whole reason for the formality of the livery of seisin disappeared; and feoffment, as a mode of conveyance, fell into disuse.

There were some other conveyances which, formerly, might have been made without deed. A valid *exchange* of land might have been made between persons each of whom had the fee-simple, or an interest of equal duration, in the land; and this might have been made without deed, and without even livery of seisin, provided entry was made by each party on the land taken in exchange. Between co-parceners who were compellable by law to make partition, partition might by the common law have been made by parol only. By the Real Property Act, 1845 (8 & 9 Vict.c. 106), all partitions and exchanges of any tenements or hereditaments, not being copyhold, are void at law unless made by deed. A *lease*, required by law (by the Statute of

Frauds or otherwise) to be in writing, of any tenements or hereditaments, not being copyhold, and an *assignment* of a chattel interest, not being copyhold, in any tenements or hereditaments, and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might (formerly) by law have been created without writing, are now by the same section of the Act made void *at law*, unless made by deed. But an instrument expressed as a lease, provided it satisfies the Statute of Frauds, may be enforced, in a Court of Equity, by a decree for specific performance (*a*). And the same principle doubtless applies to an instrument expressed as an assignment or surrender, if the terms of a contract are contained in it.

To complete the account of conveyance by deed, it seems necessary to add that some conveyances, in order that they may have full effect, so far as relates to the security of purchasers, must be recorded; *i.e.* the deed, or the substance of it, engrossed and preserved in a public office, so that all persons interested may, upon a search of the register permitted under due regulations, have notice of the contents of the deed. It may be observed that in Scotland the statutes relating to registration of deeds have made the registration essential to the title; so that the legal estate or seisin, or what is equivalent to it, does not pass to the person entitled under the deed until the deed has been duly recorded. This system has certainly effected great security to the title of a purchaser: but, on the other hand, is attended by great expense in the conveyance of small properties. For this reason, as well as by reason of the automatic shifting of the seisin under the Statute of Uses, no attempt has been made to introduce the Scotch system into England. English law has the compensating advantage of a shorter period of prescription; twelve years' undisputed possession being, generally speaking, sufficient to secure a title; whereas, in Scotland, twenty years' possession is still necessary; and, even then, the possession must

(a) *Parker v. Taswell* (1858), 2 De G. & J. 559; 27 L. J. Ch. 812.

be founded on some sort of documentary title. There are, however, certain assurances which, in England, require recording as essential to the title.

(1) The King's grants are matters of public record, and no freehold may be given to the King, nor derived from him, but by matter of record (*a*). These grants are contained in letters patent, and are recorded in the patent-rolls.

(2) The assurances formerly made by fines and recoveries comprised, as part of the procedure already described (*b*), a recorded judgment. And, as already stated, the disentailing deed substituted by the Fines and Recoveries Act for these modes of assurance must, to be effectual as a disentailing assurance, be enrolled (*i.e.* recorded) pursuant to the Act.

By the Middlesex Registry Act, 1708 (7 Ann. c. 20), a public register was established, where memorials of conveyances affecting lands in that county are to be registered, under penalty of the conveyance being regarded as fraudulent and void against a subsequent purchaser for valuable consideration. By the Middlesex Registry Act, 1891 (54 & 55 Vict. c. 10), and the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), the Middlesex Registry, and all the powers of the officials under the Act of 1708, are transferred to the Land Registry established under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), and the Registrar of this Land Registry. There are Acts of a somewhat similar character relating to the three Ridings of the County of York and the town of Kingston-upon-Hull. These acts were consolidated and amended by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54).

The Land Transfer Acts, 1875 and 1897, as well as the Land Registry Act of 1862 (25 & 26 Vict. c. 53), superseded by these Acts, are apparently intended to inaugurate a general system of registration of titles. But if so intended,

(*a*) *Richardson v. Hamilton* (Chanc., January 8, 1773); *McKenzie v. Stuart*, Dom. Proc., March 13, 1774.

(*b*) See p. 129, *et seq.*, *ante*.

the experiment has hitherto hardly been a success, partly owing to the circumstance that registration with an absolute title under the Acts is attended with great trouble and expense; and partly, no doubt, owing to the short period of limitation or prescription, through which a title may be acquired by possession; so that no documentary title could remain secure unless the facts of actual and recent possession accord with that title. This latter source of weakness in the registered title is to some extent removed by the 12th section of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), whereby it is enacted that "a title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of time." This is, however, subject to a proviso that the person who would, but for this section, have obtained a title by possession, may apply for an order for rectification of the register; and "on such application the Court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of the Act [of 1875] or of this Act [1897], order the register to be rectified accordingly."

(2) *ALIENATION BY SPECIAL CUSTOM.*

In copyhold lands, that is to say in lands held of the lord of the manor by copy of Court Roll, an exceptional mode of alienation is established by custom, and given effect to by law. In the above expression "copyhold lands" are included lands held by what is sometimes called customary tenure, which differs from the more ordinary copyhold merely by the circumstance that the tenant is expressed to hold, not at the will of the lord and according to the custom of the manor, but "according to the custom of the manor" only (a).

Copyhold tenure was not affected by the Act 12 Chas. II.

(a) This so-called customary tenure is found in manors which were in "ancient demesne," that is to say, belonged to the Crown in the reign of Edward the Confessor. In these manors there were also freeholders, who were properly called tenants "in ancient demesne," as well as other copyholders who held expressly "at the will of the lord."

c. 24, which converted freehold tenures generally into free and common socage (see sect. 7); nor does the Real Property Act, 1845 (8 & 9 Vict. c. 106), which requires a surrender to be made by deed, apply to the surrender of a copyhold interest (see sect. 3).

Copyhold estates are conveyed by surrender and admittance, surrender by the former tenant, and admittance of the new tenant by the lord. By the surrender the former tenant yields up the estate into the hands of the lord for such purposes as in the surrender are expressed; such as "to the use and behoof of A. and his heirs; to the use of his (the surrenderor's) own will"; and the like. The usual proceeding is that the tenant comes to the steward, either in the manorial Court, or (if the custom permits) out of Court; or else to two customary tenants of the same manor (provided the custom warrants this); and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands of the steward or of the two tenants, all the interest and title to the estate; in trust to be again granted out by the lord to such persons and for such uses as are named in the surrender and the custom of the manor warrants.

Although the Statute of Uses does not directly apply to copyhold estates, the surrender operates according to its intention, and there is nothing to prevent the intention to create shifting estates being carried out, just as if they had been created by the Statute of Uses. This intention is inferred by expressions which would, by the operation of the Statute of Uses, create similar estates in freehold land. At one time it was the practice, in order to dispose of copyholds by will for the testator to surrender them to the uses of his will. But this has been made unnecessary by statute. And a will executed according to the provisions of the Wills Act, 1837, has the same effect as if there had been a surrender to the uses of the will, and a custom to support such a surrender (*a*).

Upon the surrender, if made in Court, or upon presentment

(*a*) See p. 213, *post*.

of the surrender, if made out of Court, the lord, by his steward, grants the same land again to the person intended by the surrender, to hold by the ancient rents and customary services, and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name and as the symbol of corporal seisin of the lands and tenements, upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

Although the admittance is essential to complete the title of the new copyholder, he has already by the surrender a qualified title. He is not, indeed, entitled to enter upon the land or take the profits, nor can a surrender by him to another have any effect upon the legal estate. But he has the right to claim admittance from the lord. If the lord refuses to admit him, he has the right to compel admittance; and this could, even under the procedure before the Judicature Acts, be enforced, not only by a bill in Chancery, but by *mandamus* in a court of law. The admittance, when made relates back to the time of the surrender, and displaces all estates which the surrenderor in the mean time may have attempted to create, or which may have arisen by devolution of law from the surrenderor.

Where the copyhold descends to the customary heir, who is usually, though not always, the same person as the heir-at-law, an admittance is required to perfect his title. But the position of the heir, while unadmitted, differs from that of the surrenderee before admittance, so far that the heir may enter upon the land and take the profits, and may make a good devise of the land descended on him, and may upon satisfying the lord for the fine due upon the descent, surrender into the hands of the lord to such uses as he may desire. Pursuant to the Wills Act, 1837, the devisee is likewise entitled to be admitted, and the Act makes express provisions for securing to the lord the fines or payment to which he would have been entitled if there had been a

surrender duly made according to the custom of the manor.

A third case in which admittance is required is where the lord, having himself acquired the copyhold interest by escheat, descent, surrender to him the use of the lord himself or other circumstance, grants the lands *de novo* to be held by copy. If he does this he is bound to observe the ancient custom in every point, and can neither in tenure nor in estate introduce any kind of alteration; for that were to create a new copyhold, which cannot be done, although he may treat the copyhold estate as merged, and make a new grant of the lands as freehold.

Where a copyholder conveys his estate by way of mortgage, this is commonly done by a surrender *upon condition* that the money remains unpaid at the time appointed. In the mean time no admittance takes place, and, if the money is then paid, the surrender is void. Even if the money remains unpaid at the time mentioned in the condition, it is not usual for admittance to be obtained unless the mortgagee wishes to take possession; and, on payment of the money and entry of satisfaction on the Court Roll, the original title of the mortgagor remains in full force.

Under the law, as existing before the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), it was held that a custom to entail copyholds was a good custom (*a*). The practice was confirmed and extended to all copyhold estate by sects. 50–54 of this Act. The assurance is made, in the case of legal estates, by surrender, with consent by deed of the protector of the settlement, if there is one; and, in the case of equitable estates, by deed of disposition to be entered on the Court Rolls. The surrender, or deed, as the case may be, requires no enrolment otherwise than by entry on the Court Roll.

Conveyances of equitable estates in copyholds, other than

(*a*) This appears to have been an anomaly. For as a custom, to be good, must be presumed to have been in existence at the beginning of the reign of Richard I., it is difficult to see how a practice, which can only have sprung up since the statute *de donis*, can be a good custom.

disentailing assurances, are not made by surrender, but by any mode of conveyance (such as an instrument in writing signed as directed by the Statute of Frauds) sufficient in ordinary cases to pass an equitable interest.

(3) *ALIENATION BY DEVISE.*

By a "devise" of land is meant an instrument which remains ambulatory during the life of the devisor, and, upon his death, takes effect as a conveyance of the land to the devisee. It appears that, before the Norman Conquest, land in England could be devised by will. But, upon the introduction of feudal tenures, when an estate in law became dependent upon the fealty and services due from the vassal to the lord, such an instrument, being obviously incapable of creating a new relation of lord and vassal, became incompetent as a mode of conveyance. In the county of Kent, however, and some other localities, the custom of disposing of land by will was strong enough to prevail against the difficulties introduced by the feudal system.

In course of time the ingenuity of ecclesiastics, to whom, in a superstitious age, the power to dispose of property on death-bed was very convenient, invented the doctrine of uses, by which a man might devise a *use* of the land, so that the devisee of the use could, in the Court of Chancery, where ecclesiastical influence was strong, compel the execution of the use. The Statute of Uses, which, as before mentioned, annexed the seisin to the use, interposed a difficulty in this method of devise. But by the Statute of Wills, made about five years later (32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5), it was enacted that all persons seised in fee-simple (except feme-coverts, infants, idiots, and persons of non-sane memory) might, by will and testament in writing, devise to any other person (except to bodies corporate) two-thirds of their lands, tenements, and hereditaments held in chivalry, and the whole of those held in socage. And as, by the statute of Charles II., already

mentioned (a), all tenures by which a man could hold in fee-simple were turned into free and common socage, the statute enabled a man to dispose, by devise, of the whole property which he held in fee-simple. The Statute of Frauds (29 Car. II. c. 3), by sect. 12, enabled a man to devise estates which he held *pur autre vie*.

The powers of devise were confirmed and extended, with respect to all wills made on or after the 1st of January, 1838, by the Wills Act, 1837 (7 Will. IV. and 1 Vict. c. 26). By the Act, the above-mentioned Acts of Henry VIII., and some enactments which are of little interest now, are formally repealed, except so far as relates to wills made before the 1st of January, 1838, and it was (by sect. 3) enacted as follows:—

“It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this

(a) See p. 208, *supra*.

Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

It will be seen from the special provision of this section what were previously the doubts or difficulties in the way of disposition by will of certain classes of property, and particularly in regard to copyholds.

There are provisos that no will made by any person under the age of twenty-one years shall be valid. There is also a disabling proviso relating to married women, which, having regard to the Married Women's Property Acts, 1882, 1893 (45 & 46 Vict. c. 75, and 56 & 57 Vict. c. 63), is practically obsolete.

The prescribed mode of execution of the will (whether a devise of real property or a will of personalty) is enacted by sect. 9; *i.e.* "it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Any devise or gift to an attesting witness of the will is void (sect. 16); but the fact of an interest being given to an attesting witness does not otherwise avoid the will.

Unless a contrary intention appears by the will, a devise of real estate is construed to pass to the devisee the fee-simple or other whole estate or interest which the testator had power to dispose of by will (sect. 28). This merely confirmed the old rule that a fee might pass by a will without apt words of inheritance; but it extended the application of the rule which previously required some indication of intention to give more than a life estate, whereas by the new Act the intention to give the whole interest is presumed unless a contrary intention appears. It may be here observed that the intention of a will to create an estate tail may be inferred and given effect to without the precise words, such as "to A. and the heirs of his body," which would be necessary in a deed. Thus a gift in a will "to A. and his issue" will create an estate tail. So also an estate may pass by mere *implication* of the intention: as where a man devises lands to his heir-at-law, after the death of his wife, where the wife will have an estate for life by implication. And when a devise is made of Blackacre to A. and of Whiteacre to B. in tail, and if they both die without issues, then to C. in fee: here A. and B. have cross-remainders by implication, and on the failure of either's issue the other or his issue shall take the whole, and C.'s remainder is postponed until the issue of both shall fail.

The Act further contains the following provision against the lapse of a devise, which, according to the former rules of construction, would have taken place in the case here mentioned. By sect. 32: "Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi-entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately

after the death of the testator, unless a contrary intention shall appear by the will." And, by sect. 33: "Where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Speaking generally, this Act, in other respects, assimilated the devise of real estate to the will of personal estate; and for further details as to the effect and construction of the Act, it will be sufficient here to refer to what is said in describing the effect of wills as to personal estate (see p. 281, *et seq.*, *post*).

It should be added that a devise of real estate, whether operating under the statutes of Henry VIII. or under the Wills Act of 1837, may limit successive estates in the property devised so as (subject now to the Act of 1897 below mentioned) to take effect and shift the seisin or legal estate from one to another in the same way as a conveyance to uses under the Statute of Uses might have done. It is not uncommon for a will to be expressed in the form of such a conveyance, *i.e.* limiting an estate "to the use of A. and his heirs until, etc., remainder to the use of B., etc." And such a devise would create successive legal estates, just as if it were a conveyance under the Statute of Uses. But it is to be observed that this takes place not by force of the Statute of Uses, but by the statutes relating to devises, having regard to the intention of the testator inferred from his using the language of a well-known form of conveyance.

A devise which thus creates estates not allowed to be limited by the strict rules of the old common law is called an executory devise. That is to say, the devise has been said to execute itself so as to create a legal estate, just as

a use is executed by the Statute of Uses. Every executory devise as well as every estate created under the Statute of Uses, is subject to the rule of perpetuities (p. 164, *supra*).

One more complication, which may—or may not—ultimately tend to the simplification of titles, was introduced by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65). By sect. 1 of this Act, it is enacted that “where real estate is vested in any person without a right in any other person to take by survivorship (*a*), it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.” This applies to any real estate over which the deceased had a general power of appointment, but does not apply to land of copyhold or customary tenure, where an admission or act by the lord of the manor is necessary to complete the title of a purchaser. By sect. 2—subject to certain powers, etc., mentioned in the Act (that is to say, in effect, that the real estate is to be subjected, like the personal estate, to be dealt with for the purposes of administration), the personal representatives are to hold the land as trustees for the persons beneficially entitled, and upon request to convey the land accordingly.

CHAPTER XXIX.

OF PERSONAL PROPERTY.

THE great division of property made by English law into “real” (in the sense of heritable) and “personal” has been already explained (see p. 98, *supra*), and various kinds of property included in the term “real” have been noted. It has been observed that corporeal moveable things, speaking generally, are classed by English law with “personal”

(*a*) This expression, which is not easily intelligible, is presumed to be intended merely to exclude the case of a joint estate in the deceased and another, and not to apply to the case where the deceased had a life estate remainder to another.

property. There are, however, other things which do not exist in a corporeal form, which belong to the category of personal property. Of these, an important class consists of "chattels real," which, although classed as personal estate (for which reason they are termed chattels (*a*)), have the character of immobility usually associated with real estate.

Amongst chattels real are comprised terms for years in land, the next presentation to a church, the right of a judgment creditor who has sued out a writ of *elegit* against the land, and the like. The estate of a trustee or mortgagee, which formerly, so far as relates to the legal title, was real estate, is now, by the 30th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), assimilated for the purpose of succession to a chattel real (*b*).

Other examples of personal property not consisting of corporeal things, are the interest of a partner in partnership property, shares in incorporated companies, whether constituted under special Acts of Parliament, such as Railway and Canal Acts (incorporating the Companies Clauses Act, 1845), or under the general Acts relating to public companies, stock in the public funds, or in colonial or foreign funds or bonds; also copyrights and rights to patent inventions and trade-marks constituted under the various Acts relating to those subjects; also the right of the creditor in his debt, whether secured over immoveable property or not. And, as we have just seen, the title of the mortgagee is now, even in regard to the succession to the legal title to the land, regarded as a chattel interest. These things I shall include under the term "incorporeal chattels." The phrase is not, indeed, sanctioned by any usage in technical language. But I prefer the phrase to "choses in action" or "things in action," which more properly belong to mere obligations,

(*a*) The word "chattels" (*catalla*, in Glanville, etc.) was early used as a general name for the personal property, consisting of beasts of the plough and other moveables.

(*b*) This does not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls on trust or by way of mortgage. The Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 88).

such as a debt on bond or a personal obligation under a contract, regarded as a subject of property (see p. 223, *infra*).

Most of the species of incorporeal chattels are comparatively of modern invention. The older kinds of personal property, other than terms in land which, until the reign of Henry VIII., were only held on a precarious tenure, are chattels personal, consisting of things moveable, such as animals, household stuff, jewels, corn, garments, money, and everything else that can be properly put in motion and transferred from place to place. Personal chattels, other than money, have been conveniently marked by the term "goods," Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 62).

Property in chattels personal may be either in possession, which is where a man has not only the right to enjoy, but has the actual enjoyment of the thing; or else it is in action, where a man has only a bare right, without any occupation or enjoyment. Property in possession may be either absolute or qualified.

Property in possession absolute is where a man has solely and exclusively the right, and also the occupation of any moveable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be in all inanimate things, such as goods, money, jewels, and the like; such also may be all vegetable productions, as the fruit of a tree when severed from the tree, or timber when severed from the ground. But with regard to *animals*, which move themselves, there is a difference.

Animals which in their nature are tame and domestic (*mansuetæ naturæ*), as horses, kine, sheep, poultry, and the like, may be the subjects of absolute property, just as inanimate things. And if by accident or fraudulent enticement they stray from the owner's premises, he does not lose his property. In regard to tame and domestic animals, it is the rule of English law, agreeing with the civil, that *partus sequitur ventrem*. And therefore in the law of England, as well as of Rome, *si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est*. And for this Puffendorf gives a sensible reason: not only because

the male is frequently unknown, but also because the dame, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with great expense and care; wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is the case of young cygnets, which belong equally to the owner of the cock and hen, and shall be divided between them (*a*). But here the reasons of the general rule cease, and "*cessante ratione cessat et ipsa lex*," for the male is well known, by his constant association with the female, and for the same reason the owner of the one suffers no more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

On the other hand, in animals which are by nature wild (*feræ naturæ*), a man can have no absolute property, though a man may have a qualified property in them by making them tame by art, industry, or education, or by so confining them that they cannot escape and use their natural liberty. Of the latter class are deer in a park, hares, or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond. "These" (says Blackstone) "are no longer the property of a man than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases, unless they have *animus revertendi*, which is only to be known by their usual custom of returning. A maxim which is borrowed from the civil law, '*revertendi animus videntur desinere habere tunc, cum revertendi consuetudinem deseruerint*.' The law, therefore, extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animus revertendi*. So are my pigeons that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of the park or forest, and is instantly

(*a*) *Case of Swans*, Co. Rep. 17.

pursued by the keeper or forester, all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him: but otherwise if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *feræ naturæ*; but when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law. And to the same purpose, not to say in the same words, with the civil law, speaks Bracton (l. 2, c. 1, § 3); occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon; and therefore if another hives them, he shall be their proprietor: but a swarm which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them."

In creatures so reclaimed from the wildness of their nature, the property is not absolute, but defeasible. For if the pheasants escape from the mew, or the fish from the pond, and are found wandering at large in their proper element, they become *feræ naturæ* again, and are free and open to the first occupant that has the ability to seize them. But while the qualified or defeasible property subsists, an action will lie against any person who detains the animals from the owner, or who, without lawful excuse, destroys them. And it is felony by the common law to steal those animals *feræ naturæ*, which, being fit for food, are so confined that the owner can take them whenever he pleases. By the common law it was not felony or larceny to steal animals only kept

for curiosity or pleasure, as dogs, bears, cats, apes, parrots, and singing birds. By the Larceny Act, 1861 (24 & 25 Vict. c. 96) it is made a criminal offence (by sects. 18 and 19) to steal a dog or to be in possession of a stolen dog, knowing it to have been stolen; and (by sect. 21) to steal any bird, beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law; or wilfully to kill any such bird, beast, or animal with intent to steal the same or any part thereof.

A qualified property may also subsist with relation to animals *feræ naturæ*, *ratione impotentis*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or rabbits or other creatures make their burrows or nests in my land, and have young ones there, I have a qualified property in those young ones, until such times as they can fly or run away; but until then it is in some cases trespass, and in others felony, for a stranger to take them away.

In regard to certain wild animals in unenclosed land, the owner has rights analogous to the qualified rights of property above mentioned, and these rights are protected in some cases by ancient franchises of chase or forest granted by the Crown, and generally by the statutes commonly known as the game laws. But these rights cease as soon as the creatures leave the tract of land over which the protection extends. If game is killed by the owner of the land or a person authorised by him, on the owner's own land, or is started upon that land and immediately followed into the land of another and killed there, the property in the dead animal vests in the owner (or person so authorised). But if a trespasser starts game in the land of A., and hunts and kills it there, the property is in A., and not in the trespasser: *Blades v. Higgs* (H. L. 1865), 11 H. L. C. 621 (3 Ruling Cases, 76). And further, it has been stated on high authority that the property in a wild animal started by a trespasser in the land of A., and followed and killed by the trespasser in the land of B., vests in B., and not in either

A. or the trespasser. An opinion, attributed to Ch. J. HOLT, that the property in such a case would vest in the trespasser, was repudiated. Same case, *per* Lords WESTBURY and CHELMSFORD.

By the Ground Game Act, 1880 (43 & 44 Vict. c. 47), amended by the Ground Game (Amendment) Act, 1906 (6 Ed. VII. c. 21), the occupier of land has, as incident to and inseparable from his occupation of the land, a concurrent right with the owner (or other person having the right) to kill and take ground game upon the land.

A qualified right of property may also exist in other things besides animals. Thus the owner of a house may have the right to the uninterrupted access of fresh air, or light, or to possess unpolluted a stream of running water. Such rights are generally called easements.

There may also exist in one person a qualified right of property in a thing of which the property, subject to that right, resides in another. Such are bailments, where the owner delivers the goods to another for a particular purpose or use; as to a carrier to convey to London; to an innkeeper to secure in his inn, or the like. In such cases each of the parties has a qualified right of property in the thing, and each is entitled to an action against a stranger who damages or takes away the goods. So also in the case of goods pledged or pawned upon condition to repay money or otherwise; each has a qualified property. So in the case of goods taken by distress, which are still in the hands of the distrainer and not sold under his powers, the distraint being in the nature of a pledge of the goods. But a servant, who has merely the care of his master's goods or chattels, has not any property or possession of his own, his possession being regarded as that of the master.

Where the property in a personal chattel is not accompanied by possession or occupation in the owner, but such owner has merely a right to possess or occupy the thing, so that the aid of a court of justice is required in order to recover or obtain possession of the thing, the right in the chattel so recoverable is called a "thing (or chose) in

action." Thus money due on a bond is a chose in action. So is the right to recompense for the damage which I may sustain by the failure of another to perform his covenant or contract with me.

Again, as to the time of enjoyment. By the rules of the ancient common law, there could be no future property to take place in expectancy, created in personal goods and chattels. But where a man by his last will and testament devised personal chattels to one for life, with remainder to another, this has been allowed to create an implied trust, the property being in the executor. But neither the statute *de donis* nor the Statute of Uses applies to personal goods and chattels, and consequently the common-law notion of a property indivisible in regard to time of enjoyment still holds good generally in regard to such things. And no entail can be created in things personal. A gift or devise made to A. and the heirs of his body, is, in effect, so far as relates to personal estate, a gift of the absolute property to A.

Speaking generally, in order to create interests successive in point of time in personal estate, an express trust is necessary, whereby the entire property is vested in the trustee or trustees, and the beneficial interests, consisting of equitable rights available only against the trustees or others who have taken the property with notice of the trust, are given in succession, conditionally, or otherwise, according to the intention of the maker of the trust.

Although the enjoyment could not by the common law be limited in point of time, it has always been possible for the ownership in things personal, just as in lands and tenements, to be held by two or more persons in joint tenancy, or as tenants in common. Where the property consists of stock on a farm, or stock used in a partnership undertaking, the presumption is that the owners are tenants in common, and not joint tenants.

CHAPTER XXX.

OF THE TITLE TO PERSONAL PROPERTY.

THE following are the principal titles, or modes by which personal property is acquired or lost, namely:—

1. Occupancy (including title by invention, etc.).
2. Prerogative and Forfeiture.
3. Custom.
4. Succession and Marriage.
5. Judgment.
6. Gift or Grant, Contract or Assignment.
7. Bankruptcy.
8. Testament and Administration.

1. *TITLE BY OCCUPANCY.*

(1) It has been said that anybody may seize to his own use such goods as belong to an alien enemy. Although this is generally laid down by some of our writers, it must, in reason and justice, be confined to such captors as are authorised by the public authority of the State, and to such goods as are brought into this country by an alien enemy, after a declaration of war, and without a safe conduct or passport.

This principle of occupancy formerly applied to give the captors the property in an enemy's ship, or goods taken at sea by a ship duly authorised under letters of mark. But by the Naval Prize Act, 1864 (27 & 28 Vict. c. 25, s. 39), any ship or goods taken as prize by any of the officers and crew of a ship other than one of H.M.'s ships of war, belongs, on condemnation, to the King in his office of Admiralty. The Act and Orders in Council made under it provides for distribution of the proceeds amongst the officers and crew. By sect. 40 of this Act, where a ship or goods belonging to British subjects, after being taken as prize by the enemy, are retaken from the enemy by any of H.M.'s ships of war, the same shall be restored to the owners on payment of a proportion of value by way of salvage. Having regard to

the Declaration of Paris of 1856, the goods of an enemy on board a neutral ship cannot, nor can the goods of a neutral on board an enemy's ship, with the exception in each case of contraband of war, be condemned as prize.

The jurisdiction of a prize court is exercised by the Admiralty Division of the High Court in England, and by Vice-Admiralty Courts in the British Colonies or possessions under the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27).

(2) Things found upon the surface of the earth, or in the sea, under such circumstances that they may be presumed to have been abandoned by the former proprietor, belong to the finder, unless they fall within the description of waifs, estrays, or wreck, which belong to the Crown.

(3) With regard to animals *feræ naturæ*, they belong generally by what is called a natural right to the captor, who has a qualified property in them so long as kept in confinement, and an absolute property when dead. But this so-called natural right is subject to special laws, such as the rule that whale and sturgeon are regarded in England as royal fish, and to various statutes generally comprised in the expression "game laws."

(4) Analogous to the right arising by occupation is the right to what are called *emblements*. This is a special property in corn, or other produce growing on the ground, given by law to the possessor of the land who has sown or planted it, whether he is owner of the inheritance or of a less estate. The emblements are regarded by law as distinct from the real estate in the land, and subject to some, though not all, of the incidents attending personal chattels. They were devisable by testament before the Statute of Wills, and, at the death of the owner, vest in his executor (or administrator), and not his heir; and by statute (Distress for Rent Act, 1737, 11 Geo. II. c. 19), though not by the common law, they may be distrained for rent in arrear. In other respects they were not regarded as personal chattels; for instance, until severed from the ground, they could not be the objects of larceny at common law.

(5) Also analogous to the right of property founded on occupancy is that arising from *accession*. By the Roman law, if any corporeal substance received an accession by natural or artificial means, as by the growth of vegetables, the pregnancy of animals (*a*), the embroidering of cloth, or the conversion of wood or metal into vessels or utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself, by such operation was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted. These doctrines have been adopted by Bracton, and have been confirmed by many resolutions of the Courts. It has even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman (*b*).

But in the case of confusion of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay with that of another man, without his approbation or knowledge, or casts gold into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has improvidently lost. But according to the strict principles of English law, to guard against fraud, the entire property is given, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent.

The above principles, as laid down by Blackstone, were

(*a*) See p. 220, *ante*.

(*b*) Blackstone, Book II., ch. 26, s. 6.

cited, and, with some modification, applied by Lord ELDON (Lord Chancellor) in an equity case where the defendants had, with notice of an adverse right, worked a mine under the plaintiff's land, and mixed up the produce with that of their own mine, so as to make it difficult, if not impossible, to prove how much had been taken from each mine. An account was directed on the principle that the defendants should be charged with the whole proceeds, except what they could strictly prove to be those of their own mine, and that the defendants should bear the costs of the inquiry: *Lupton v. White* (1808), 15 Vesey 432 (10 R. R. 94).

(6) Upon a principle analogous to that of occupancy is grounded the right of a person to the products of his literary or artistic skill. To these might perhaps have been added the products of inventive skill, which are protected under patents within the powers defined by statute. But as these rights, though in one sense acquired by the inventive skill of the patentee, still technically arise out of the grant of the patent by the Crown, they will be presently referred to under the head of Prerogative.

COPYRIGHT (LITERARY AND ARTISTIC).

How far the privilege of multiplying copies of a literary composition, when once published, could have been protected by the common law, was a question on which much diversity of legal opinion has been expressed. The older authorities favour the notion that there was a right to protection at common law. But, after the case of *Jeffreys v. Boosey*, decided in the House of Lords in 1854 (4 H. L. Cas. 815, 24 L. J. Ex. 81), it must be taken as settled law that no protection can be given to a published composition, whether literary, musical, or artistic, except so far as it is protected by the various statutes. On the other hand, the author or composer of a work, whether of literature, science, or art, while the work is unpublished, has a right of property in the work, and may restrain by injunction an unauthorised publication: *Macklin v. Richardson* (1770), Ambler 694; and Ruling Cases, No. 1 of "Copyright," vol. 7, p. 66, *et seq.*

The proprietor of a copyright is also entitled to an injunction as well as to the remedy by action expressly given to him by the statutes.

The statutes now in force relating to copyright are enumerated in the second schedule to the Short Titles Act, 1896 (59 & 60 Vict. c. 14), under the collective title "The Copyright Acts, 1734 to 1888."

They are as follows:—The Engraving Copyright Act, 1734 (8 Geo. II. c. 13); the Engraving Copyright Act, 1766 (7 Geo. III. c. 38); the Copyright Act, 1775 (15 Geo. III. c. 53); the Prints Copyright Act, 1777 (17 Geo. III. c. 57); the Sculpture Copyright Act, 1814 (54 Geo. III. c. 56); the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15); the Lectures Copyright Act, 1835 (5 & 6 Will. IV. c. 65); the Prints and Engravings Copyright (Ireland) Act, 1836 (6 & 7 Will. IV. c. 59); the Copyright Act, 1836 (6 & 7 Will. IV. c. 110); the Copyright Act, 1842 (5 & 6 Vict. c. 45); the Colonial Copyright Act, 1847 (10 & 11 Vict. c. 95); the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68); the Copyright (Musical Compositions) Act, 1882 (45 & 46 Vict. c. 40); the Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17). To these may be added the International Copyright Act, 1886 (49 & 50 Vict. c. 33), and the Acts mentioned in the schedule to that Act.

The first statute relating to literary copyright was passed in the year 1709 (8 Ann. c. 19). It was repealed by the Act of 1842, which considerably extended the privileges of authors. By the Act of 1842 (5 & 6 Vict. c. 45) "copyright" is defined as the sole and exclusive liberty of printing or otherwise multiplying copies of the book or other subject of the right; and it is enacted that the copyright of every book published in the lifetime of its authors shall be the property of the author and his assigns, and shall endure for the author's natural life and for seven years longer; or, if the seven years expires before the end of forty-two years from the first publication, then it endures for that period of forty-two years; and that the copyright

of every book published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietors of the author's manuscript from which the book is first published, and his assigns: see *Macmillan v. Dent*, 1906, 1 Ch. 101.

The statute further enacts that a copy of every book published shall be delivered at the British Museum, and that upon request copies shall be furnished to certain libraries.

Provision is made for registration in the book at Stationer's Hall of the proprietorship in the copyright; and no action for infringement can be commenced before the book is entered for registration; but the registration is not essential to the existence of the copyright itself. A registered proprietor may assign his copyright by entry in the book in the prescribed form; and the assignment so made is effectual without any stamp or stamp duty as if the assignment had been made by deed (sect. 13).

The privilege of sole representation of a dramatic piece, already conceded to the author and his assignees by the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), was by the Act of 1842 extended to the full time provided by that Act for the continuance of copyright: and the protection so given to a dramatic piece was also by the Act of 1842 extended to musical compositions: the first public representation or performance being declared to be for this purpose, equivalent to publication in the case of a book. This right of representation is a distinct right from the copyright in the dramatic piece or musical composition in the form of a book; and the author may assign the right to representation and reserve the copyright, or *vice versâ*. The assignment of the copyright does not convey the right of representation unless an entry is made in the register-book of the assignment so as to express the intention that the right of representation shall pass with it (sect. 22).

As to the right of representation of musical compositions, vexatious actions became frequent, and the Acts of 1882

and 1888 (45 & 46 Vict. c. 40, and 51 & 52 Vict. c. 17) were passed to minimise this inconvenience. These statutes provided for a notice to be given on the title-page of all printed copies of a composition in which it is intended to maintain the sole right of representation: and also, to discourage vexatious or frivolous actions, provided that the Court or judge before whom an action comes should have absolute discretion as to costs. On the other hand, for infringement by printing or selling copies of a musical composition, a summary remedy is given by the Musical Copyright Act, 1906 (6 Ed. VII. c. 56).

Further, by the Act of 1842 it was made unlawful to import into any part of the British dominions reprints made abroad of a copyright book printed or published in the United Kingdom. But by the Colonial Copyright Act, 1847 (10 & 11 Vict. c. 95), the Crown was authorised to suspend by an Order in Council the prohibition against the importation of such reprints into any British possession, in a case where the legislative authority in such Possession had made due provision for securing to British authors reasonable protection within such Possession.

The Act also, to prevent the suppression of books of public importance, enacts (sect. 5) that, on complaint made to the Judicial Committee of the Privy Council that the proprietor of the copyright in a book after the death of the author has refused to republish the book, the Judicial Committee may, on such conditions as they think fit, authorise the complainant to republish the book.

In the case of an encyclopedia, review, or magazine, although the author of an article has disposed of the copyright to the proprietor the right of republication reverts to the author after twenty-eight years; and where the author of the article has expressly or by implication reserved his right to republish it in a separate form, he is entitled to the copyright in the work so published (sect. 18).

The copyright in prints, engravings, etc., is secured by the Acts of 1734, 1766, 1777, and 1836 (8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; and 6 & 7 Will. IV.

c. 59). The protection extends to a term of twenty-eight years. Sculptures are protected under the Sculptures Copyright Act, 1814 (54 Geo. III. c. 56), for a term of fourteen years.

Copyright in paintings, drawings, and photographs is secured to the author, under certain conditions, by the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68). The right endures for the life of the author and seven years after his death. The author, upon sale of a picture, etc., must, if he wishes to reserve the right, do so expressly by agreement in writing signed by the vendee at or before the time of the sale. Otherwise the copyright belongs to the purchaser of the picture, etc., or his assignee.

Under sect. 4 of this Act, registration as there prescribed is made a condition of the title to the copyright.

By the Lectures Copyright Act (5 & 6 Will. IV. c. 65) lecturers are given, under conditions which few will take the trouble to comply with, protection from the unauthorised publication of their lectures. There appears, however, to be nothing in this Act to interfere with any right which the lecturer to a class, to which the public are not indiscriminately admitted, may have at common law as the author of an unpublished composition. And such a right has been decided by the House of Lords to belong to a professor delivering a lecture to a class in a Scotch University: *Caird v. Sime* (H. L. Sc., 1887), 12 App. Cas. 326. It remains a question, perhaps to be determined at some future time, whether a speaker at a public meeting can be regarded as the author of an unpublished composition, so as to give him a right to prevent the publication, without his consent, in a newspaper (or other book), of his speech taken down in shorthand: see *Walter v. Lane* (1900), A. C. (pp. 539, 547). In this case (*Walter v. Lane*) it was decided that the person so publishing the speech is himself the author of a book within the Copyright Acts, so as to be entitled to restrain the republication by another of the matter so published.

Upon the copyright statutes the following are some

of the points which have been ruled by decisions of the Courts.

New corrections and additions to an old work are subject-matter for copyright, so that an action lies for pirating the new corrections and additions, although the copyright in the work without those additions or corrections is expired: *Cary v. Longman* (K. B., 1801), 1 East 353; and see 7 R. C. 78, *et seq.*

A person who employs another for remuneration to compile a book for him is, as the equitable assignee of the author, entitled to the copyright of the book: *Grace v. Newman* (1875), L. R. 19 Eq. 623; 7 R. C. 86, *et seq.* Photographs, however (under the Fine Arts Copyright Act, 1862, 25 & 26 Vict. c. 68), stand on a different footing, and unless the employer takes some part in the production of the negative, he appears to be under insuperable difficulties in maintaining the copyright: *Nottage v. Jackson* (C. A., 1883), 11 Q. B. D. 627; 52 L. J. Q. B. 760. For he is not the author within the meaning of the Act; and an assignee is not (by sect. 1) entitled to the copyright unless an agreement in writing has been made, signed by the person disposing of it. And (by sect. 4) the requirements of registration also impose a difficulty. The same consideration would apply to a picture, unless the copyright is expressly reserved by the agreement in writing and the assignment is registered accordingly.

A true and proper abridgment, being the result of intelligent work and literary skill, condensing into a small compass the substance of a comparatively large work, by retrenching unnecessary and uninteresting circumstances, and conveying the sense in fresh language, is a new and meritorious work, and does not infringe the copyright in the larger work: Case of "Dr. Hawkesworth's Voyages," *Hawkesworth v. Newberry* (1774), Loft. 775; *Gyles v. Wilcox* (1740), 2 Atk. 141; 7 R. C. 94, *et seq.* The question is whether there has been copying which is "material and substantial": *Chatterton v. Cave* (H. L., 1878), 3 App. Cas. 483; 47 L. J. C. P. 545. A typical instance of an allowable

abridgment would be furnished by such a book as "Lamb's Tales from Shakespeare."

In such works as directories, containing information which, if accurate, must be nearly identical, or of other works compiled from common sources, the question is whether the new compiler has worked out the information independently. He may use the old book as a guide and correction, but he must not use it so as to save himself the labour of original inquiry: *Kelly v. Morris* (1866), L. R. 1 Eq. 697; 35 L. J. Ch. 423; *Pike v. Nicholas* (1869), L. R. 5 Ch. 251; 39 L. J. Ch. 435; 7 R. C. 102, *et seq.*

For the purposes of the International Copyright Act, 1886 (49 & 50 Vict. c. 33), it is sufficient that the foreigner has complied with the requirements of the country in which the work was first published, and it is not necessary that he should also comply with the provisions of an English statute as to registration: *Hanfstaengl Art Publishing Co. v. Holloway* (1893), 2 Q. B. 1; 62 L. J. Q. B. 347; 7 R. C. 134, *et seq.*

(7) Upon a principle analogous to occupancy, are also grounded the rights acquired by reputation or habits of dealing in the course of trade. Such are "goodwill" and "trade-name," or "trade-mark."

GOODWILL.

"Goodwill" consists of the advantage obtained by a trader who has for some time carried on a business, arising from the habit of his customers resorting to him in that business. It is sometimes (as annexed to some tangible property) a valuable asset; and, with or without express covenants, is frequently assigned for value. It does not, however, constitute property in such a sense that it can (to any important effect) pass to the trustee in bankruptcy of the trader: *Walker v. Mottram* (1881), 19 Ch. D. 355; 51 L. J. Ch. 108.

A partner who, according to his partnership agreement, has no share in the goodwill of the business, is not entitled,

on the dissolution of the firm, to solicit in a similar business the custom of those who have previously dealt with the firm. Nor is a trader who has included, in a sale of property, the goodwill of his business, entitled to solicit in a similar business the custom of those who have previously dealt with him; but in the absence of express negative covenants there is nothing to prevent such persons setting up a rival business, and dealing with the customers of the old business who come to him unsolicited: *Jrego v. Hunt* (H. L., 1895), 1896, A. C. 7; 65 L. J. Ch. 1; 12 R. C. 442, *et seq.*

TRADE-MARK.

The right to a trade-mark or trade-name is grounded on the principle that no person is allowed to represent the goods which he sells as being the manufacture of another whose goods have become known under the trade-mark or trade-name. So a trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers (whether immediate or ultimate) into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods: *Reddaway v. Banham* (H. L.), 1896, A. C. 199; 65 L. J. Q. B. 381; 25 R. C. 193. But a trader is not to be restrained from merely selling goods in his own name, unless such use of his name is shown to be fraudulent: *Burgess v. Burgess* (1853), 3 De G. M. & G. 896; 22 L. J. Ch. 675; 25 R. C. 186. The principle was laid down in this case by Lord Justice KNIGHT BRUCE as follows:—

“All the Queen’s subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen’s subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their father; nor is there anything else that this defendant has done in question before us. He follows the same trade as that his father follows and has long followed, namely, that of a manufacturer and seller of pickles,

preserves, and sauces; among them, one called 'essence of anchovies.' He carries on business under his own name, and sells his essence of anchovies as 'Burgess's Essence of Anchovies,' which in truth it is. If any circumstances of fraud, now material, had accompanied, and were continuing to accompany, the case, it would stand very differently; but the whole case lies in what I have stated. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovies. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name."

The principle, resting on presumed deception of the purchaser, is independent of the section of the Acts relating to Trade Marks (46 & 47 Vict. c. 57, s. 64; and 51 & 52 Vict. c. 50, s. 10), which, in effect, exclude a merely descriptive name of an article from being registered as a trade-mark. This is, in effect, shown by the judgment of FRY, L.J., in *In re Apollinaris Company's Trade Mark* (C. A., 1890), 1891, 2 Ch. 186; 61 L. J. Ch. 625. He says (1891, 2 Ch., at p. 225): "A man in the same trade as the one who has wrongfully registered a trade-mark, and who desires to deal in the article in question, is *primâ facie* 'an aggrieved person' (within the meaning of 46 & 47 Vict. c. 57, s. 90, as amended by 51 & 52 Vict. c. 50, s. 23). This may be rebutted by showing that, by reason of some circumstances entirely independent of the trade-mark, the person complaining never could carry on any trade in the article; but the burden of tendering such proof is on the man who claims the mark." And see *Powell v. Birmingham Vinegar Brewery Co.* (1894), A. C. 8; 63 L. J. Ch. 152.

By sect. 10 of the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), amending sect. 64 of the Act of 1883, it is enacted that, for the purposes of the Act, a trade-mark "must consist of or contain at least one of the following essential particulars:—

- “(a) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner ; or
- “(b) A written signature or copy of a written signature of the individual or firm applying for the registration thereof as a trade-mark ; or
- “(c) A distinctive device, mark, brand, heading, label, or ticket ; or
- “(d) An invented word or invented words ; or
- “(e) A word or words having no reference to the character or quality of the goods, and not being a geographical name.”

Here “invented word or words” was substituted for “fancy word or words” in the former Act, which had proved a fertile mine of litigation. A word may be registered as an “invented word” within category (d), although it is excluded from category (e) by reason of its having some reference to the character of the goods : *Eastmans Photo, etc., Co. v. Comptroller-General, etc.* (H. L.), 1898, A. C. 571 ; 67 L. J. Ch. 628.

NEW AND ORIGINAL DESIGNS.

Part III. of the Patents, Designs, and Trade Marks Act, 1883, provides for the registration and consequent protection, for a term of five years, of “any new and original designs.” A design may be “new and original” within the meaning of the Act (sect. 47), although the design is a reproduction of a subject-matter which is well known (such as a representation, in relief, of Westminster Abbey), if the application of the design to some article of manufacture is new and original : *Saunders v. Wiel* (C. A., 1892), 1893, 1 Q. B. 470 ; 62 L. J. Q. B. 341. But registration of an old design to a different article of the same class is not competent : *Re Clarke's Design* (C. A.), 1896, 2 Ch. 38 ; 65 L. J. Ch. 629 ; and see 25 Ruling Cases 257, *et seq.*

2. TITLE BY PREROGATIVE AND FORFEITURE.

By prerogative, a title may accrue either to the King himself or to such as claim under the King's grant, or by prescription, under which an ancient grant is presumed.

The right of the Crown to tributes, taxes, and custom is either inherent in the Crown by ancient prerogative, or created by the authority of Parliament. In these the King acquires and the subject loses a property the instant they become due; if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither may be referred all forfeitures, fines, and amercements due to the King, which accrue by virtue of his ancient prerogative or by statute. In either case the owner of the thing forfeited, and the person fined or amerced, lose the property, the instant the King or his grantee acquires it.

The King cannot have a joint property with any person in one entire chattel, nor can the King become a joint tenant with another person or chattel real, or in the right to an obligation. Thus, if a horse be given to the King and a private person, the King has the sole property: if a bond be made to the King and a subject, the King has the whole, the debt or duty being one single chattel. So if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the King, or incurs a forfeiture of his property to the Crown, the King shall have the entire property in the horse, and entire debt. The cases where forfeiture occurs are rendered much less frequent (*a*) since the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), which abolished forfeiture for treason or felony or *felo de se*, subject to the proviso that the Act should not affect the law of forfeiture

(*a*) Formerly the forfeiture might occur by a man committing suicide, and being found by an inquest *felo de se*. This was solemnly decided in the year 3 Eliz., in the case of Sir James Hales, who and his wife were joint tenants of a term of years. He committed suicide, and was found *felo de se*, and it was held that Sir James's interest was forfeited to the King by felony, and that this drew the wife's interest along with it. See report in Plowden, 262 (Eng. edit.).

consequent upon outlawry. As outlawry in civil proceedings was abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59, s. 3), the only general cause of forfeiture, now, appears to be that of outlawry in a criminal proceeding.

Of chattels which are originally and solely vested in the Crown by prerogative are wreck, treasure-trove, waifs, estrays, royal fish, swans, etc. These are originally inherent in the Crown by law, and only held by subjects of the Crown as franchises by the royal bounty.

There is also vested in the Crown a kind of prerogative copyright in certain books. Thus (1) the King has the exclusive privilege of printing, by his own printers, or by his grantees, who print, "*cum privilegio*," all Acts of Parliament, proclamations, and orders of council. (2) As supreme head of the Church the King has the sole right to the publication of all liturgies and books of divine service for the use of England. (3) He is also said to have a right by purchase to the copies of such law books, grammar, and other compositions as were compiled or translated at the expense of the Crown. And (4) upon one or other of the last-mentioned principles, or of both combined, he has the exclusive privilege of printing the authorised translation of the Bible.

The Game Laws contained in various statutes appear to be a relic of the privileges introduced along with the feudal system by which the right of occupancy in animals *feræ naturæ* was restrained. By the civil law, indeed, this right was restrained by the condition that a man was not allowed to hunt over the land of another without the owner's leave. But along with the feudal system grew up privileges which restrained the rights even of the owners of the soil in favour of the King or such persons as were authorised by him. And, so far, this principle is maintained by the statutes that a man cannot lawfully kill game even in his own land without the license of the Crown. Yet there can be no doubt that the property in the dead animal is governed by the rules already stated (p. 222, *ante*),

although the owner (or persons authorised by him) may be liable to the penalty for sporting without a license.

3. TITLE BY CUSTOM.

The claim of a right by custom is much restricted by the principle that, to be good, the custom must have existed from the time of legal memory, that is to say, the commencement of the reign of Richard I. (1189); and if the claim is for a fee payable in money, it must be such as would have been reasonable at that time. See *Mounsey v. Ismay* (Ex. 1865), 3 H. & C. 486; 34 L. J. Ex. 52; *Bryant v. Foot* (Ex. Ch. 1868), 9 B. & S. 444; L. R. 3 Q. B. 497; 37 L. J. Q. B. 217; and 8 Ruling Cases 275, *et seq.*

A customary right, which may still be of considerable value, is that to a *heriot*, being a personal chattel, generally the best beast that the tenant of a manor is possessed of, which, by the immemorial custom of certain manors, is due to the lord upon the death of the tenant. The property in the beast (when ascertained) is considered to have vested in the lord upon the death of the tenant, and the lord is entitled to seize it wherever it is found, whether within the ambit of the manor or not: *Western v. Bailey* (C. A. 1896), 1897, 1 Q. B. 86; 66 L. J. Q. B. 48; 17 Ruling Cases 1-10.

4. TITLE BY SUCCESSION AND MARRIAGE.

Strictly speaking, there is no title by succession in things personal, unless so far as the successive persons constituting a corporation can be said to succeed to the goods of the corporation consisting of the persons (one or more) to whom they have succeeded. On the death of a man or woman the title to his or her personal property does not, strictly speaking, vest by succession, but requires to be completed by the authority of the Court to whom the Sovereign has delegated that office. This office was at one time performed by the Ecclesiastical Courts succeeding to the jurisdiction of the bishops; but by the Court of Probate

Act, 1857 (20 & 21 Vict. c. 77) these Courts were abolished and their powers given to the Probate Court then constituted. Under the Judicature Acts these powers are now vested in the High Court of Justice and exercised by the Probate Division.

It has been said, indeed, that the executor derives his title from the will; whereas that of the administrator does not exist until the grant is made. But even in the latter case the title relates back to the death, to the effect of enabling the administrator to recover against a wrong-doer, and to ratify an act done for the benefit of the estate. See *Fenton v. Clegg* (Ex. 1854), 23 L. J. Ex. 197; 12 Ruling Cases 1; and *Foster v. Bates* (Ex. 1843), 13 L. J. Ex. 88; 2 Ruling Cases 129. The Title under Testament and Administration will be more particularly dealt with under that heading (p. 274 *et seq.*, *infra*).

By *marriage*, formerly, whatever personal property belonged to the wife before marriage, became, by marriage, absolutely vested in the husband, provided that (in the case of things in action and chattels real) he did some act to reduce the chattel into possession. Thus, if he received the money due upon a bond or sold a chattel real (as a lease), the interest of the wife was at an end; though, in regard to a chattel real, the property of the wife was not divested by his merely receiving the rents. In articles of dress or ornaments (called *paraphernalia*) also the law, to a certain extent, recognised a continuing property in the wife.

Although amongst persons of property and station this consequence of the law was to a greater or less extent avoided by marriage settlements, creating in the wife a separate estate recognised in Courts of Equity, the law actually prevailed, so far as there was no such settlement executed in writing according to the Statute of Frauds.

This state of the law was completely altered by the Married Women's Property Acts, 1882 and 1893, fully referred to in an earlier part of this work (see p. 74 *et seq.*, *ante*). The old law can only affect the property of persons

married before the 1st January, 1883, and that only so far as the law is not altered by these Acts in regard to persons then already married.

5. TITLE BY JUDGMENT.

A judgment in a Court of Justice is frequently the means of vesting the right of property in a chattel interest. The vesting of the property by the judgment must be distinguished from the case where the property is already vested, and the judgment is merely to recover possession. As in the case of a judgment to recover a debt by bond, or to recover a debt upon a bond, or to recover a chattel (such as a horse) which a man has contracted to purchase. But where a man sues to recover a penalty which is prescribed by statute to be recovered at the suit of an informer, or to recover damages for an injury, the right is only vested by the judgment. So is the right to the costs of an action which is only acquired by the judgment. And under the Rules of Court framed pursuant to the Judicature Acts (Ord. 42, r. 24) every Order of the Court or a judge may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.

After judgment for a sum of money, a judicial proceeding having some analogy to an assignment of a debt due from a third party to the judgment-creditor, is effected by what is called a "garnishee order."

The proceeding is now embodied in the Rules of Court (Ord. 45) under the Judicature Acts. The first rule runs as follows:—"The Court or judge may, upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself, or his solicitor, stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called

the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge, or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order." By the subsequent rules of the same Order, the attachment of the debt becomes binding in the hands of the debtor from the date of the service of the (garnishee) order, or of such notice of the order as the Court may direct. Further provisions are made for execution in the hands of the garnishee, or if the debt is disputed, for determination of the liability and consequent execution.

When the garnishee order is satisfied by payment, whether such payment is, or is not, enforced by execution, there is an end *pro tanto* of the debt. So that the order, when satisfied, has the full effect of an assignment or transfer of the debt. How far the garnishee order has, in the mean time, the effect of an assignment, has been a question leading to subtle distinctions. That the order is not an assignment or transfer of the debt so as to constitute between the garnishee and the debtor of the judgment debt the relation of "creditor" for the purpose of presenting a petition for the winding-up of a company under the Companies Acts, has been decided by the Court of Appeal in *In re Combined Weighing and Advertising Machine Co.* (C. A., 1889), 43 Ch. D. 99; 59 L. J. Ch. 26. The principle of that decision was, however, questioned by ROMER, L.J., in *Pritchett v. English and Colonial Syndicate* (C. A.), 1899, 2 Q. B. 428, where the Court of Appeal held that the garnishee order absolute does, at least, give the garnishee a right of action against the debtor in a case where there are no assets on which he can levy execution. For by Ord. 42, r. 24 of the Rules of the Supreme Court, already cited, an order of the Court may be enforced in the same manner as a judgment. The garnishee order has no higher operation, in respect of

priority, than any other mode of equitable assignment (a) : *Davis v. Freethy* (C. A., 1890), 24 Q. B. D. 519.

The proceeding by garnishee order was originally introduced into the practice of the ordinary courts of common law by the Common Law Procedure Act, 1854, and the description of the property to be attached as a "debt owing or accruing" has been strictly construed as confined to a debt properly so called; that is to say, *debitum in presenti*, though it may be *solvendum in futuro*. So that where property is vested in trustees of which the income (which may or may not come to the hands of the trustees) is payable by them half-yearly to the judgment debtor, who has received the last half-yearly payment, and there is no money the proceeds of the trust property in the hands of the trustees, there was held to be no debt "owing or accruing" which could be attached: *Webb v. Stenton* (C. A., 1883), 11 Q. B. D. 518; 52 L. J. Q. B. 584.

The proper proceeding for the attachment and realisation of such an interest of the judgment debtor as that just mentioned, as well as in all cases of equitable interests which cannot be described as "debts," is by the appointment of a receiver, under the practice of the old Court of Chancery, which is extended in the practice of the Courts, as now constituted, to all cases where such an appointment can be brought under the elastic words "just or convenient": Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25).

6. TITLE BY GIFT, GRANT, OR CONTRACT.

The distinction between a *gift* and a *grant* is that a gift is always gratuitous; a grant is made upon some consideration or something given or promised in return; although the consideration may be merely nominal.

In regard to chattels real, it is to be observed, as it has been already stated (at p. 199, *supra*), that a lease or assignment for a term not exceeding three years may be made without writing. It is not very often that a lease is

(a) See p. 267, *post*.

made without any consideration, but generally a rent is reserved, although it be merely nominal, such as a peppercorn (if demanded). And the transaction, if executed by giving possession, is a grant; if not executed, a contract.

Grants or gifts of chattels personal consist in the act whereby one man renounces, and the other acquires, all title and interest therein; which may be done either in writing or by word of mouth attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. In the case of a true and proper gift of a chattel capable of being actually delivered, the delivery of possession has been ruled, by the Court of Appeal (confirming a decision of the King's Bench, in 1819, notwithstanding subsequent cases and *dicta* throwing doubt upon it), to be essential to complete the donee's title, unless the gift is made by deed: *Irons v. Smallpiece* (K. B., 1819), 2 B. & Ald. 551; *Cochrane v. Moore* (C. A., 1890), 25 Q. B. D. 57; 59 L. J. Q. B. 377; 12 Ruling Cases 408, *et seq.* But where A. by words of present gift gave to B. an undivided one-fourth share in a horse, and then by a written contract in a bill of sale sold the horse to C., who agreed by parol that the one-fourth share should belong to B., it was held that, assuming the bill of sale to be valid, so that the property passed to C., the verbal agreement by C. as to the one-fourth share, which was incapable of actual delivery, constituted him a trustee of the one-fourth for B.: *Cochrane v. Moore*, *supra*.

But if the gift does not take effect by delivery of immediate possession, or by deed or otherwise, so as to transfer the property, the transaction is a bare promise which cannot be enforced by action.

By the statute 13 Eliz. c. 5, already referred to (at p. 198, *ante*), a gift or grant of chattels, as well as lands, with an intent to defraud creditors, is void against the creditors; and the intent has been held to be presumed where the gift or grant is such as would necessarily defeat creditors. The effect of this statute is incorporated in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 4 (1) (b)).

A *contract* is defined by Blackstone as "an agreement upon sufficient consideration, to do or not to do a particular thing." Three points are to be observed: (1) the agreement; (2) the consideration; (3) the thing to be done or omitted.

(1) The agreement may be express or implied. *Express*, where the terms of the agreement are openly stated at the time of making the agreement; *implied*, where the terms are to be presumed from what is actually done. As, if I employ a person to do work for me without mentioning any remuneration, the law implies that I contracted to pay him as much as his labour deserves. Or, if I take goods from a tradesman without anything said as to price, the law concludes that I agreed to pay a reasonable price. And it is always implied in a contract that if one party fails in his part of the contract, he shall pay the other such damages as he has sustained by that failure.

A contract may be *executed*, *i.e.* such that it effects an immediate conveyance of property; as, if A. sells to B. a horse for a certain sum, the property in the horse at once vests in B., and the right to the price in A. Or it may be *executory*, as, if A. agrees to sell B. so many quarters of barley equal to sample, in which case the right conveyed to B., until the bulk is accepted, is merely a chose in action.

(2) As to the consideration. A good consideration, so far as relates to a *deed*, may consist of nothing more than what would be presumed from the deliberate intention evinced by the sealing of the deed. Thus a bond "under A.'s seal" to pay B. a sum of money, although no cause of granting it is expressed, will create a good cause of action in favour of A., subject only to any defence on the ground of actual fraud. But a mere agreement by A. to pay or perform to B.—where there is no prior obligation upon A. to make it, and there is not anything given or any right released, or any obligation incurred by B.—is *nudum pactum*, out of which no right of action by A. arises. If there is a moral obligation upon A. to make the agreement

—for instance, where A. owes a debt although barred by the Statute of Limitations — his agreement is no longer *nudum pactum*. And if there is something given, some right waived, or some obligation incurred by B., any of which would constitute a valuable consideration moving from him, there is a binding contract.

Besides instruments under seal, there are some other instruments which, by the usage of merchants and for commercial convenience, have been allowed to be enforced by action without proof of consideration. Such are bills of exchange and promissory notes. Between the immediate parties to these instruments, indeed, parol evidence may be given to impeach the consideration (Chalmers, 4th edit., p. 57). But in favour of a “holder in due course,” such instruments have the further privilege of being enforceable against the person bound by his signature, without any regard to the terms on which the instrument was made or delivered between the original parties. In this they are of superior efficacy to a bond under seal, the assignee of which takes no better right of action than his assignor would have had. At common law, indeed, a bond was not considered to be, in the strict sense, assignable; and the so-called assignee was merely a person who had obtained, for value, an irrevocable power of attorney from his assignor, and sued in the assignor’s name. In equity, a bond was treated as assignable; but, according to the principles of equity, the equitable assignee was subject to all the equitable rights which were available against the assignor; and the fact that the remedies both at law and equity are now vested in the same Courts does not make any difference in the nature of the title.

(3) The thing to be done under the agreement is indefinitely varied according to the circumstance and intention of the parties. And these varieties will be more appropriately considered further on in relation to obligations. At present the subject-matter to be considered is the title to property in the strict sense of the word; that is to say, the general or absolute right of property. For this purpose

a class of contracts which requires special consideration is that for the sale of goods.

A contract for the sale of goods is a contract made with the intention that the general property in the goods shall pass from the seller to the buyer in consideration of a price. The contract becomes executed (or executes itself) according to its intention, provided that by the time the transfer of property is intended to take effect the goods have been specifically ascertained. For ascertaining the intention as to the time when the transfer shall take place, where not otherwise expressed, certain presumptions have been established by a long series of decisions. The *criteria* are now laid down by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), as follows:—

“16. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

“17.—(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

“(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

“18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

“Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

“Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable

state, the property does not pass until such thing be done, and the buyer has notice thereof.

“Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

“Rule 4.—When goods are delivered to the buyer on approval or ‘on sale or return’ or other similar terms, the property therein passes to the buyer:—

“(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction :

“(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

“Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made :

“(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.”

In order that a title may vest by the sale of goods, it is important to bear in mind the conditions which were laid

down in the 17th section of the Statute of Frauds. This section was formally repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 60), but the effect is by sect. 4 (1) of the same statute re-enacted with some further provisions embodying the effect of subsequent interpretation of the statute as follows:—

“A contract for the sale of any goods of the value of £10 or upwards shall not be *enforceable by action* (a) unless the buyer shall accept part of the goods as sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

“(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

“(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

“(4) The provisions of this section do not apply to Scotland.”

When it is said that by a contract of sale of specific goods the property in the goods passes, it is not meant that the buyer may carry them away without paying for them; unless, indeed, it is agreed that credit should be given. Until payment, the vendor has a right in security, which has been called a *special property*, arising out of his original right of property. To realise this right in security, the vendor has, on the insolvency of the buyer, or on his default

(a) The words in italics are substituted for the words in the Statute of Frauds, “allowed to be good.” It would be difficult, however, to imagine a case in which the difference would be material.

in such circumstances that a refusal to perform his contract may be inferred, a right to resell the goods. If credit is given, the vendor's right is suspended during the currency of the credit; but on the expiry of the credit, or sooner, if the buyer becomes insolvent while the goods are still in the vendor's possession, his rights revive: and, if the goods are *in transitu*, although consigned to the purchaser, the vendor has a right to take them out of the hands of the forwarding agent and sell them in payment, or part payment, as the case may be, of the price. This last-mentioned right (called the right of "stoppage *in transitu*") is, however, subject to the rights of an indorsee for value of the bill of lading: Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 47) (a).

Hitherto it has been assumed that the person selling, or purporting to sell the goods so as to vest the property in the purchaser, is himself the owner. And where A. purports to make a contract with B. for the sale of goods, so as to vest the property in B., A. would (as between himself and B.) be estopped by his conduct from denying that the property is vested in B. In other respects, apart from the principles to be next considered, B. acquires only such property as A. has at the time of the sale.

Where a sale is made by A.'s agent within his authority, that carries the title exactly as if the sale had been made by A. personally. And the same principle applies to sales by persons invested by the law with a power of sale.

The title so acquired by a purchaser may be constituted in the following ways:—

- (a) By agency with power of sale.
 - (b) By sale in market overt.
 - (c) By dealing with a negotiable instrument operating according to the custom of merchants.
 - (d) By sale under legal process.
- And to these must be added the modified title—
- (e) By equitable assignment.

(a) See p. 304, *infra*.

(a) *Agency with Power of Sale.*

This may be constituted by express mandate of the owner, or by a mandate implied by law. Where the mandate is express, there can be little doubt as to the title of the purchaser.

Of implied mandates, the following are amongst the most important :—

(1) That of the master of a ship under exceptional circumstances.

(2) That of the pledgee of goods.

(3) That of a “mercantile agent” under the Factors Acts.

(1) The master of a ship is primarily employed by the shipowner, and his agency for the owners of the goods exists generally for the mere purpose of carrying them to their destination. It is only in case of shipwreck or other emergency which renders it necessary that the goods should be dealt with in some other manner, that a special responsibility, with consequential powers, devolves upon him in relation to the goods. In such cases, it is his duty, if possible, to communicate with the consignees, so as to obtain their directions, which he is bound to follow strictly : *Acatos v. Burns* (C. A., 1878), 3 Ex. D. 282. Only in a case of unforeseen and unprovided necessity, where no correspondence can be had with the owners of the goods so that their directions can reasonably be expected before the necessity of action arises, the master is justified in assuming, and is bound to assume, the character of agent for the owners of the goods : *The Gratitude* (1801), 3 Ch. Rob. 237 ; *The Buonaparte* (1865), 8 Moo. P. C. 473 ; *Wilson v. Millar* (1820), 2 Stark 1 ; *Cargo Ex Hamburg* (1863), 2 Moo. P. C. (N. S.) 289.

Under such circumstances as last mentioned, it is the duty of the master, having regard to the interests of both ship and cargo owners, to carry on the goods in the original bottom, if practicable. For that purpose it is within the

implied authority of the master to hypothecate the ship freight and cargo by a bottomry bond. To make such a bond valid, even as regards the ship and freight, it must appear that the shipowners are without personal credit in the place, and that the outlay is necessary in order to enable the ship to proceed on her voyage: *The Oriental* (1864), 7 Moo. P. C. 398, 409. And, as regards the cargo, there is the further condition, that the money could not be raised on the ship and freight alone.

If it is impracticable to carry on the goods in the original bottom, the master may tranship the cargo, and it is his duty, if practicable, to do this rather than sell the goods. But, in the extreme case, where it is impracticable either to repair or to tranship, or to place the goods in safe keeping on the owner's account until directions can be given for dealing with them, the master is justified in selling them. The burden of proof in such a case is illustrated by the case of *Atlantic Mutual Ins. Co. v. Huth* (C. A., 1880), 16 Ch. D. 474, which shows that it is hardly possible to justify the master in selling for a lump sum the chance of recovering a miscellaneous cargo, including goods which are, comparatively speaking, imperishable. In such a case it would be only fair to the owners of the latter goods for the master to try to induce persons to recover the cargo on salvage remuneration.

In all cases which would justify the master in raising money by hypothecating the cargo, he would have a discretion to sell part of the cargo, if by that means he can raise the money necessary to carry on the rest so as substantially to perform his contract: *The Gratitude*, 3 C. Rob. 240, 263.

Such are the principles on which the authority of the master is regarded by English law. But the extent of his authority is differently interpreted by different systems of law; and, where the circumstances are such that, according to the general maritime law (as explained above), the relation of agency is constituted between the master and the owner of the goods, the extent of the authority is

governed by the law of the flag : *Lloyd v. Guibert* (1865), 6 B. & S. 100 ; *The Karnak* (1869), L. R. 2 P. C. 505.

(2) The implied mandate of a pledgee of goods to sell the goods, arises, generally, on default in payment of the debt according to the terms of the loan. The ordinary contract of a pawnbroker is a pledge of this kind. The contracts of pawnbrokers, however, have been regulated by a number of statutes which have been consolidated by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

In English law a mortgage of goods differs from a pledge. By a mortgage of goods, the owner is conceived of as entirely divesting himself of the property, and reserving only a right of redemption, being a personal right against the mortgagor. The power of sale is vested in the mortgagee as an incident to the property, and not, as in the case of pledge, by virtue of an express or implied mandate. A mortgage of goods, as distinguished from a pledge, may be made without delivery of actual possession, and this is usually done by an instrument called a bill of sale. But the title of the mortgagee of goods not clothed with actual possession may be defeated under the provisions of the Bills of Sale Acts, as well as under the reputed ownership clause of the Bankruptcy Act, which will be considered in the sequel.

(3) An important class of mandates implied by law consists of the statutory power conferred upon "mercantile agents" under the Factors Acts.

The Factors Acts may be briefly described as a statutory extension of the principle of estoppel, applied to mercantile agency. Of course, if A., the owner, entrusts B. with the custody of his goods, and by his conduct represents or holds out to a class of traders, of whom C. is one, that B. has authority to sell the goods ; then if C., on the faith of that representation, purchases the goods from B., A. will be estopped, in any question with C., from disputing C.'s title to the goods on the ground that B. was not authorised by him to sell them.

Now, suppose the goods in the actual custody of X. for

the purpose of carriage or of safe keeping, or for some other purpose not usually associated with any power of disposal of the goods. The owner A. receives from X. a document acknowledging that the goods are in his custody, and undertaking, on demand, to deliver them to A. or his assigns (by indorsement or otherwise), or to bearer, as the case may be, on payment of freight or warehousing charges, etc. A. delivers the document to B., having indorsed it by way of assignment, or else having had it made out in B.'s name instead of his own. Then it is clearly apparent to all persons having dealings with B., and seeing the document in his hands, that B. is either himself the owner of the goods, or is entrusted by the owner with the goods for some purpose which is not in any way defined or limited on the face of the document.

In such circumstances the question had been frequently discussed in the Courts whether A., by arming B. with such a document, had represented or held out that B. had authority to sell or pledge the goods. The Courts have been always inclined to the negative of any such proposition: although there has been a frequent tendency in the practice of merchants to rely on such documents as representing an unlimited authority to deal with the goods. To meet the views of the mercantile community, various Acts were from time to time passed; the Courts always giving to such Acts the most strict and limited construction, which required further legislation to enlarge. The earlier Acts were consolidated and extended by the Factors Act, 1889 (52 & 53 Vict. c. 45), the leading provisions of which are as follows:—

“Section 1. For the purposes of this Act—

“(1) The expression ‘mercantile agent’ shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

“(4) The expression ‘documents of title’ shall include

any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

"Section 2.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him, when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

"(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

"(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being, or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

"(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary."

It is further (by sect. 6 of this Act) enacted that "an

agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf, shall be deemed to be an agreement with the agent." The Act contains (sect. 7) a further provision as to goods consigned or shipped by the owner in the name of another person, so that the consignee (not having notice that the person is not the owner) may safely make advances on the goods to the apparent shipper. And (by sect. 8) provisions are made in favour of persons dealing on the faith of the possession of goods which have been allowed by the purchaser to remain in the possession of the vendors, or have been delivered by vendors to purchasers subject to the vendors' rights. And (by sect. 10) the privilege enjoyed by a *bonâ fide* transferee of a bill of lading to defeat the right of stoppage *in transitu* is extended to transferees of other "documents of title."

(b) *Sale in Market Overt.*

Reverting to the modes of acquiring title by a purchaser, as classified at p. 251, *ante*, there is next to be considered the effect of a sale in *market overt*. This is an ancient privilege enjoyed by certain markets; and the principles are now embodied in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

By section 22 of this Act, "where goods (that is to say chattels personal other than things in action or money) are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." Sales of horses are excepted by the Act. They are the subject of special enactments to be presently adverted to.

Market overt, in the country, is held only on the special days provided for particular towns by charter or prescription; but, in the city of London, every day, except Sunday, is a market day. The market-place, or spot of ground set apart by custom for the sale of particular goods, is also, in the country, the only market overt; but, in the city of

London, every shop in which goods are exposed publicly for sale is market overt for such goods only as the shopowner professes to trade in.

Special provisions relating to the sale of horses are contained in the Acts 2 Ph. & M. c. 7, and 31 Eliz. c. 12. By these it is provided that the horse shall be openly exposed, in the time of such "fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market; that toll be paid, if any be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the name, additions, and abode of the vendee and vendor, the latter being properly attested." It is further enacted that such sale shall not take away the property of the owner, if, within six months after the horse is stolen, he puts in his claim before some magistrate, where the horse shall be found, and, within forty days more, proves his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But, in case any one of the points before mentioned be not observed, the sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

The effect of a sale in market overt is subject to the restriction that, where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods, which may have been acquired by a *bonâ fide* purchaser in market overt, reverts in the person who was the owner: Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 24). This principle was laid down by the statute 21 Hen. VIII. c. 11, and embodied in the Act of 1827 (7 & 8 Geo. IV. c. 29, s. 57) relating to larceny, both since repealed. The effect of these enactments was embodied in the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 100), and extended to cases of obtaining by fraud not amounting to theft. This extension

of the principle is negatived by the above section (24) of the Sale of Goods Act, 1893. The principle does not apply to negotiable instruments, which were not the subjects of larceny at common law, and were in effect exempted from the operation of the Larceny Acts: *Chichester v. Hill* (1883), 53 L. J. Q. B. 160. The section (24) of the Sale of Goods Act, 1893, clearly does not relate to negotiable instruments, which are not "goods" within the definition of the Act.

The revesting dates from the conviction, and does not relate back, so that if a *bonâ fide* purchaser of goods held under a voidable title has (without notice of the owner's title) sold them before conviction, he is not responsible for them, nor liable to account for the price to the owner: *Horwood v. Smith* (1788), 2 T. R. 750; cf. *Peer v. Humfrey* (1835), 2 Ad. & El. 495; and see *Lindsay v. Cundy* (1876), 1 Q. B. D. 348.

(c) *Transfer of Property by dealing with a Negotiable Instrument operating according to the Custom of Merchants.*

The *bonâ fide* purchaser (being the holder in due course) of a *negotiable instrument* acquires a good title notwithstanding the want of title of any previous holder.

Negotiable instruments are instruments of obligation which by the general usage of merchants have obtained this privilege. The privilege accompanies the legal right which the holder enjoyed, without the aid of the Judicature Acts, to sue in his own name upon the obligation. The principal types of negotiable instruments are bank-notes, cheques, bills of exchange, and promissory notes. Exchequer bills are negotiable, bonds of a foreign government, which are transferable to bearer according to the tenor of the instrument, and according to the law of the country of issue, and which are also, by the usage of our markets, passed from hand to hand, like exchequer bills, are held to be negotiable by the law of this country: *Gorgier v. Mieville* (1824), 3 Barn. & Cres. 45; 5 Ruling Cases, 198. Other instruments may be from time to time allowed to be negotiable, on clear evidence of a general usage by which such

instruments are dealt with as negotiable. In the case of the *London Joint Stock Bank v. Simmons* (1892), A. C. 201 ; 61 L. J. Ch. 723, the evidence was chiefly that of usage *on the Stock Exchange*. This being uncontradicted, and the bonds (of the Buenos Ayres Bank) bearing on the face of them that they would pass from hand to hand, and that any *bonâ fide* holder would be entitled to payment, this evidence was considered by the House of Lords to be sufficient.

It will have been already seen that the practical operation of a negotiable instrument is similar in many respects to that of a "document of title" within the meaning of the Factors Act, 1889. But the principle is essentially different. The negotiable instrument operates by the custom of merchants, which invests the holder of the instrument with a new title. The title under the Factors Act arises by a statutory extension of the presumption of agency and the doctrine of estoppel by representation. To complete the chain of title under the Factors Act, the possession of the document by the mercantile agent must be by the consent of the owner, and the dealing must be "in the ordinary course of business of a mercantile agent." The crucial distinction is that a negotiable instrument (where endorsed in blank or payable "to bearer"), although stolen from the owner, will give a title afterwards to a *bonâ fide* holder.

Bills of lading have been already mentioned as enumerated amongst the documents of title under the Factors Act, 1889. These instruments have, independently of the Act and by the usage of merchants, an operation in some respects similar to that of a negotiable instrument. Where goods have been shipped under a bill of lading expressed to be deliverable "to X. Y. or his assigns, he or they paying freight," a *bonâ fide* purchaser of the goods taking the bill of lading endorsed by X. Y. acquires a title with a very strong presumption of ownership. The shipment is an act which is *primâ facie* evidence of ownership in the shipper, and the shipper's title, at that point, being assumed, the disposing power—whether by the terms of the bill of lading reserved to the shipper himself (*Ogg v. Shuter* (1875), 1 C.

P. D. 47), or given to another (*Garbarron v. Krefst* (1875), L. R. 10 Ex. 274)—is effectually vested in the person to whom the bill of lading is made out. The goods being at sea, the indorsement and delivery of the bill of lading, with the intention to transfer the property, transfers the legal property accordingly. And where the intention is to transfer the property out and out, and not merely to create a right in security (*Sewell v. Burdick* (1884), 10 App. Cas. 74), the right of suing upon the contract contained in the bill of lading is transferred likewise: Bills of Lading Act, 1855 (18 & 19 Vict. c. 111, s. 1). In such a case the analogy between a bill of lading and a negotiable instrument is merely complete. But the bill of lading is not a negotiable instrument, and its effect depends on the continuity in the chain of title between the shipper and the person relying upon the instrument.

A further effect of the indorsement of the bill of lading to a *bonâ fide* purchaser is that this defeats the right of stoppage *in transitu*. But this effect will be further considered in the sequel under the head of "rights in security relating to moveables" (a).

(d) *Sale under Legal Process.*

Where goods of a debtor are taken in execution under a judgment, the property has been said at common law to be bound as from the date of the *teste* of the writ of execution. This was altered by the Statute of Frauds, which enacted that the property should not be bound until the writ was delivered to the sheriff to be executed. This was again modified by a clause in the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 1). These sections of the Statute of Frauds and the Act of 1856 were repealed, and their effect substantially (or nearly so) embodied in the 26th section of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which runs as follows: "(1) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as

(a) See 297, *post*.

from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ, to endorse upon the back thereof the hour, day, month, and year when he received the same.

“Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

“(2) In this section the term ‘sheriff’ includes any officer charged with the enforcement of a writ of execution.”

The *bonâ fide* purchaser of goods is therefore protected if the sale has taken place before he has notice of the delivery of the writ to the sheriff. But this is only if the execution is at the suit of a subject. Where the execution is by the Crown, *e.g.* under a writ of extent, the goods are bound as from the date of the *teste* of the writ; and the execution by the Crown prevails against the execution by a subject where the goods have been seized under a *feri facias* and remain unsold in the hands of the sheriff: *Giles v. Grover* (H. L., 1832), 1 Cl. & Fin. 72; 11 Ruling Cases, 549, *et seq.*

The statutes which so modify the common law were enacted in favour of the purchaser, and not for the benefit of the execution debtor. So that against the execution debtor the right of the creditor to get the property accrues from the *teste* of the writ. And if the debtor dies after the writ is issued, and before the delivery of the writ into the hands of the sheriff, his goods are still bound by it in the hands of his executors (*a*).

The title to property in goods is for the most part constituted by occupancy, as above described and transferred by

(a) See Blackstone, Book II. ch. 30. *Waghorne v. Langmead* (1796), 1 Bos. & P. 571; 4 R. R. 739; 11 Ruling Cases, p. 623.

contracts of sale. The property in a *chose in action*, or debt, is generally constituted by the contract, whereby the debt or obligation itself is constituted, and, according to the principles of the common law as distinguished from equity and modern statute law, the title to the property is not, except in the case of negotiable instruments, transmissible by contract or assignment.

Having regard to the form in which they are constituted, debts are divided into debts of record, debts by specialty or special contract, and debts by simple contract.

A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff in an action, this is a contract of the highest nature, being established by the sentence of a Court of Judicature. Debts upon recognisance are also a sum of money, recognised or acknowledged to be due to the Crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like; and these, together with statutes merchant and statutes staple, etc., if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, namely, debts of record, since the contract on which they are founded is witnessed by the highest kind of evidence, namely, by matter of record.

Debts by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of sale, by lease under seal reserving rent, or by bond or obligation under seal. These are looked upon as the next class of debts after those of record, being confirmed by special evidence under seal.

Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of more easy proof, and

therefore better than a verbal promise. By the Statute of Frauds (29 Car. II. c. 3, s. 4), it is enacted that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debts, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Here again must be mentioned the species of debts upon simple contract, constituted by bills of exchange and promissory notes, the former arising out of the custom of merchants and the latter by statute. The law upon this subject is now consolidated and expressly defined by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

By sect. 3 (1) of this Act, a bill of exchange is defined as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer."

Bills are either inland or foreign.

By sect. 4 (1) an inland bill is a bill which is, or on the face of it purports to be, (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. For the purposes of the Act, "British Islands" mean any part of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of His Majesty.

(2) Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

The only difference, in effect, between inland and foreign bills is that in the latter case the bill must be duly protested for non-acceptance or non-payment, as the case may be, in order to charge the drawer and indorsers (sect. 51). In the case both of inland and foreign bills, in order to charge the drawer and indorsers, the holder must give them due notice of dishonour (sects. 48-50).

A promissory note is defined (sect. 83) as follows:—

(1) A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand, or at a fixed and determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer (sect. 83).

(2) An instrument in the form of a note, payable to maker's order, is not a note within the meaning of the Act, unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands, is an inland note. Any other note is a foreign note (*a*).

Subject to certain provisions and exceptions specified in the Act, the provisions of the Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. In applying those provisions the maker is deemed to correspond to the acceptor of a bill, and the first indorser of a note is deemed to correspond with the drawer of an accepted bill, payable to drawer's order (sect. 89).

The rights and powers of the holder of a bill (or note) which chiefly distinguish these instruments from other

(*a*) As, however, protests on a foreign promissory note, which is dishonoured, is unnecessary (by sect. 89 (4)), the distinction between inland and foreign notes appears to be immaterial.

instruments in writing (whether under seal or not) constituting a debt are the following (sect. 38):—

(1) He may sue on the bill in his own name. That is to say, he has the right at law, as distinguished from the merely equitable right, which could formerly only have been enforced in the Court of Chancery.

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

(3) Where his title is defective, (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and (b) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

A “holder in due course” is thus defined (sect. 29):—

(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact.

(b) That he took the bill in good faith, and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

It will be observed that the instrument known as a cheque comes within the above definition of a bill of exchange. It is defined (sect. 73) as a bill of exchange drawn on a banker payable on demand.

The quality of being negotiable may be excluded by express words on a bill of exchange or cheque, and the crossing of a cheque by two parallel transverse lines, with or without the name of the banker between, is a sufficient notice to the banker on whom it is drawn not to pay it except to a banker, or (as the case may be) to the banker named (sects. 76–82). And see the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. VII. c. 17).

There is another common instrument of debt which has a certain degree of importance, though much less than the instruments already described, namely, what is termed a note of hand, or “I. O. U.” A note in writing, acknowledging a debt of certain amount—for which purpose the letters “I. O. U.” and the stated sum (£100, or as the case may be) have been considered sufficient—is, when signed by the debtor, evidence in law of an account stated between the parties, and, as such, is effectual to bind the debtor for the purpose of an action by the creditor. But such an instrument is not in any sense negotiable.

(e) *Equitable Assignment.*

To complete the description of title acquired by contract, it is necessary to take note of the title acquired (by the principles of *equity*, as distinguished from common law) by contract purporting to assign for value a right to personal property, other than such goods as are the subject of the common law contract of sale. Except in the case of negotiable instruments, no transfer of a right of the class above described (p. 219, *supra*), as “incorporeal chattels,” could at common law give a complete title—or what is conveniently called the “legal,” as distinguished from an “equitable” title—to the property, without the concurrence, expressed in the appropriate manner, of the debtor or other party to the legal relation intended to be

dealt with. Thus, where the property is a simple debt or bond (not negotiable), the attornment of the debtor in the original obligation, so as to create a novation of the debt, was (at common law) necessary to give a complete or legal title to the assignee. Now, by the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25), an absolute assignment of a debt or chose in action (properly so called), of which express notice has been given to the debtor, is effectual to transfer the legal right to sue upon the debt or obligation. But the right so transferred is subject to any equity which would, according to the previously existing rules of law and equity, have been entitled to priority over the right of the assignee.

In order that an equitable assignment should be effectual as such, it is not essential that the transaction should comply with the requirements of the Judicature Act so as to give a complete legal title: *Brice v. Bannister* (C. A. 1870), 3 Q. B. D. 569; *William Brandt's Sons and Co. v. Dunlop Rubber Co.* (H. L.), 1905, A. C. 454.

If A. and B. are parties to a contract which may eventually create an obligation upon B. to make a payment to A., any informal arrangement between A. and C. made for valuable consideration, with the intention that C. should receive such eventual payment, is an equitable assignment; and if B. has notice of it, he is bound to give effect to it accordingly.

An equitable assignment may cover, not only specific property, but a class of property under a general description, with the effect that the assignment attaches upon fresh property coming under the description, and that a legal title to such property may be acquired by taking possession, or appropriate proceedings: *Holroyd v. Marshall* (H. L. 1862), 10 H. L. C. 191; *Tailby v. Official Receiver* (H. L. 1888), 13 App. Cas. 523; 10 Ruling Cases, 426.

Under the same head may be classed the securities in the form of debentures charging the "undertaking and property" of a company. These, when properly issued under the powers of constitution of the company, and registered under sect. 14 of the Companies Act, 1900 (63 & 64 Vict. c. 48), create what is called a "floating

charge," the effect of which is to permit the company to acquire and dispose of property in the ordinary way of business; but the debenture holder has the right, in case of default, to obtain the appointment of a receiver; and, upon the winding-up of the company, the security attaches so as to become a specific charge upon the property of the company as it exists at that date: *Illingworth v. Houldsworth*, 1904, A. C. 355.

7. TITLE BY BANKRUPTCY.

The title by bankruptcy, which affects the real as well as the personal estate of the bankrupt, was lightly touched upon in regard to real estate (a), and is here to be more minutely considered (b) under the following heads:—

- (1) Who may become a bankrupt.
- (2) What acts make a bankrupt.
- (3) The proceedings to constitute bankruptcy.
- (4) The vesting of the estate on bankruptcy.

(1) *Who may become a bankrupt.*—A bankrupt was formerly defined to be a trader, who secretes himself, or does certain other acts, tending to defraud his creditors. He was formerly considered merely in the light of a criminal or offender; but, more recently, the laws of bankruptcy were modified so as to be adapted for the benefit of trade and to admit the principles of humanity as well as

(a) At p. 194, *supra*.

(b) The statutes now in force relating to bankruptcy, known under the collective title "The Bankruptcy Acts, 1883 to 1890 (Short Titles Act, 1896)," are the following:—

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

The Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 Vict. c. 9).

The Bankruptcy (Office Accommodation) Act, 1885 (48 & 49 Vict. c. 47).

The Bankruptcy (Office Accommodation) Act, 1886 (49 & 50 Vict. c. 12).

The Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 61).

The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62).

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

The following statutes are also important in connection with this subject viz.:—

The Debtors Act, 1869 (32 & 33 Vict. c. 62).

The Debtors Act, 1878 (41 & 42 Vict. c. 54).

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 1 (5) (3)).

The Deed of Arrangement Act, 1887 (50 & 51 Vict. c. 57).

justice. The Bankruptcy Acts now in force apply not only to traders, but to non-traders, and they not only benefit the creditors by giving the bankrupt's estate and effects to a trustee for their use, but also give relief to the debtor by allowing him, under certain conditions, a discharge from his debts, as well as allowing him to earn something by assisting to realise his property.

An infant cannot be made a bankrupt: *Ex parte G. W. Beauchamp, Re Beauchamp* (C. A., 1893), 1894, 1 Q. B. 1; 63 L. J. Q. B. 105: s.c. nom. *Lovell v. Beauchamp* (H. L.), 1894, A. C. 607.

By the Married Women's Property Act, 1882, s. 1 (5), it is enacted that "every woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." It has, however, been decided that where a judgment is recovered against a married woman in the usual form (as settled in *Scott v. Morley*, C. A., 1887, 20 Q. B. D. 120; 57 L. J. Q. B. 43), so that execution is expressly limited to her separate estate, no bankruptcy notice can follow upon such a judgment so as to found bankruptcy proceedings: *Ex parte Lester & Co., Re Hannah Lymes* (C. A.) 1893, 2 Q. B. 113; 62 L. J. Q. B. 372.

(2) *By what acts may a man be made a bankrupt.*—The condition precedent for bankruptcy to ensue is always the commission by the debtor of what is called an "act of bankruptcy." By sect. 4 of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy in each of the following cases:—

"(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally:

"(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof:

"(c) If in England or elsewhere he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon which would, under this or

any other Act, be void as a fraudulent preference if he were adjudged bankrupt :

- “(d) If, with intent to defeat or delay his creditors, he does any of the following things, namely, departs out of England, or, being out of England, remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house :
- “(e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any Court, or in any civil proceeding in the High Court :
- “(f) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself :
- “(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained :
- “(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.”

(3) *The proceedings to constitute bankruptcy.*—The proceedings following the bankruptcy petition are briefly noted in a subsequent chapter (p. 492, *et seq.*) relating to

procedure. It is sufficient here to note that bankruptcy is ultimately effected by an order of the Court adjudicating the debtor bankrupt.

(4) *The vesting of the estate on bankruptcy.*—On the adjudication of bankruptcy, the property of the bankrupt (sect. 20) becomes divisible amongst his creditors, and vests in a trustee.

Until a trustee is appointed, the official receiver is the trustee for the purposes of the Act; and upon every appointment of a trustee (whether original or new) the property vests in that trustee without the necessity of any transfer or conveyance. And where, in British dominions, enrolments, or recording of conveyances or assignments of property, is required by law, the certificate of appointment of a trustee is deemed to be a conveyance or assignment of the property, and may be registered, enrolled, or recorded accordingly (sect. 54).

The title of the trustee relates back to the date of the act of bankruptcy upon which the petition is grounded, or to the date of any prior act of bankruptcy which has occurred within three months of the presentation of the petition (sect. 43). The title of the trustee does not extend to property held by the bankrupt on trust for another; but it extends to any property devolving on the bankrupt at any time prior to his discharge, and to all powers in respect of property which the bankrupt might have exercised for his own benefit. The trustee is further entitled to all goods (including debts due to the bankrupt in the course of his trade or business, but not otherwise including rights of action) which at that date when the trustee's title commenced were "in the possession order or disposition of the bankrupt in his trade or business, by the consent or permission of the true owner, under such circumstances that he is the reputed owner thereof." From the property of the bankrupt divisible amongst his creditors are excepted the tools of his trade and the necessary wearing apparel and bedding of himself, his wife, and children, to a value not exceeding twenty pounds in all (sect. 44).

As between the trustee in bankruptcy and a creditor who has issued execution or attached a debt, the title of the trustee prevails, unless the competing creditor has completed his execution or attachment before the date of the receiving order and before he has notice of the presentation of a bankruptcy petition, or of an available act of bankruptcy by the debtor. For this purpose an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure; and, in the case of an equitable interest, by the appointment of a receiver (sect. 45). A person who purchases goods in good faith under a sale by the sheriff acquires a good title against the trustee in bankruptcy (sect. 46).

Voluntary settlements made by the bankrupt within two years of bankruptcy may be avoided by the trustee unless it can be shown that at the time of the settlement the bankrupt was able to pay his debts without the aid of the property settled (sect. 47). Fraudulent preferences to creditors made within three months of bankruptcy are also made void against the trustee (sect. 48). The presumption of fraud, raised by the payment or conveyance made in favour of the creditor, is made without pressure by the creditor.

The relation back of the title of the trustee and the other provisions above mentioned in this connection are obviously designed to secure the principle that from the time when the inability of the bankrupt to pay his debts has become manifest either by open declaration, or by an attempt of the bankrupt to prefer favoured creditors, or to defraud his creditors by conveying away his estate to relations or confident persons; from that moment the property which he has, or which he afterwards acquires, until he obtains his discharge, shall be fairly distributable amongst the creditors. But it would be too great a hardship upon other persons, and too great a discouragement to trade, if persons dealing *bonâ fide* with the debtor should find that, owing to a secret act of bankruptcy, the property which they had honestly acquired should be divested by the relation back of the

trustee's title. And accordingly: Creditors and other persons making payments to or having dealings with the bankrupt are protected as regards contracts and dealings prior to the date of the receiving order, if at the time of the payment, contract, or dealing such creditor or other person had not notice of an available act of bankruptcy (sect. 49).

Where property—for example, a leasehold interest in land or right under a contract with a mutual obligation—is held under conditions imposing a liability, the trustee may, subject to the provisions of the Act, disclaim the property so as to put an end to the liability so far as the bankrupt and trustee are concerned, and it is provided that any person suffering loss by reason of the disclaimer may have the damage assessed, and may prove the amount so assessed as a debt under the bankruptcy (sect. 55).

When the trustee has realised the property, or so much of the property of the bankrupt as can, in his opinion, be realised without needlessly protracting the trusteeship, and distributed a final dividend, an order may be made by the Board of Trade releasing the trustee. On such release the property, if there is any remaining, vests in the official receiver (sect. 82 of Act of 1883).

8. *TITLE BY TESTAMENT AND ADMINISTRATION.*

The power of giving a title to the personal estate of a deceased person is now vested in the Probate Division of the High Court of Justice as the successor to the Court of Probate (*a*), which again succeeded to the jurisdiction of the old Ecclesiastical Courts exercising the jurisdiction which had been assumed by the bishops of the dioceses where the deceased had his domicile.

This will be considered under the heads: (1) some salient points in the history of testaments and administrations; (2) who is capable of making a last will and testament; (3) the nature of a testament and its incidents; (4) what an executor and administrator are, and how they are to

(*a*) Constituted under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

be appointed; and (5) some of the more general duties of executors and administrators.

(1) *As to the origin and history of testaments and administration.*—The growth in England of testamentary power over the personal estate is somewhat obscure. It was probably under the influence of the Church that the freedom of testamentary bequest anciently prevailing under the Roman law (and only modified in the later Roman law by certain provisions in favour of the children of the deceased) was allowed to modify the customs of Northern Europe, where the Germans as known to Tacitus had “nullum testamentum.” But it is certain that, up to the twelfth century, the testamentary power in England was restrained, as it still is in Scotland, by the rights of the wife and children, the widow being entitled to the one-third and the children to one-third amongst them of the goods; or, the widow being entitled, if there were no children, to one-half, and the children, if there were no widow, to one-half (*a*). This was probably the division intended to be recognised by *Magna Charta*, which provides that the King’s debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased; and, if nothing be owing to the Crown, “omnia catalla cedant defuncto, salvis uxori ejus et pueris suis rationabilibus partibus suis” (*b*). How the “rationabiles partes” came to be frittered away is a point left in great obscurity. It seems to have been at one time assumed that the rights to the third (or half, as the case may be) of the widow and children were the creatures of local custom which latterly survived only in the province of York, in the principality of Wales, and in London; and these customs were eventually abolished by statute (*c*). Now, by the Wills Act, 1837 (1 Vict. c. 26) it is enacted (by sect. 3) “That it

(*a*) See Glanville, Bk. 2, ch. 5; Council of Cashel (A.D. 1172), Wilkins, *Councils*, vol. i. p. 473, art. 6; *Leges Burgorum* (1124–1153), c. 115.

(*b*) 9 Hen. III. c. 18.

(*c*) See 1 Jac. II. c. 17, s. 8; 4 & 5 W. & M. c. 2; 2 & 3 Ann. c. 5; 7 & 8 Will. III. c. 38; 11 Geo. I. c. 18, s. 17.

shall be lawful for every person to devise, bequeath, or dispose of, by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law, or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him; or, if he became entitled by descent, of his ancestor, or upon his executor or administrator."

As to *administration*, the following account, mainly following Blackstone, is sufficient to make the present law intelligible.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the King was entitled to seize upon his goods as the *parens patriæ*, and general trustee of the kingdom. This prerogative the King continued to exercise for some time by his own ministers of justice; and probably in the County Court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who long exercised a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition (*a*). Afterwards the Crown (as a concession, doubtless, to a long standing claim on the part of the Church) invested the prelates with this branch of the prerogative. The goods therefore of intestates were given to the ordinary (or bishop of the diocese where the deceased had his domicile) by the Crown; and he might seize them and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money in *pious usus*; that is to say, he held the goods in trust to distribute the same or the proceeds in charity to the poor, or in such superstitious uses as the mistaken zeal of the times has denominated pious. Thus the ecclesiastics, who no doubt usually enjoyed the benefit where

(a) 9 Co. Rep. 38.

a person could be persuaded to make a will for the good of his soul, got the power of administration into their hands, where the deceased had omitted to make a will. And, being entrusted with the administration in the latter case, they naturally insisted that their right of distributing the chattels should not be superseded without a will proved to their satisfaction. And their jurisdiction over the probate of wills ensued accordingly.

“The goods of the intestate being thus” (to quote the language of Blackstone) “vested in the ordinary upon a sacred trust, the reverend prelates were not accountable to any but to God and themselves for their conduct. But even in Fleta’s time it was complained ‘*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes, nullam vel saltem indebitam faciunt distributionem.*’ . . . And by a gloss of Pope Innocent IV., written about the year 1250 (a), it is laid down for established canon law that ‘*In Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*’ Thus the popish clergy took to themselves (under the name of the church and poor) the whole residue of the deceased’s estate, after the *partes rationabiles*, or two-thirds, of the wife and children were deducted, without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the Statute of Westminster II. (13 Edw. I. c. 19) that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will; a use more truly pious than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the *residuum*, after payments of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of this power occasioned the legislature again to interpose, in order to prevent the

(a) In Decretal, l. 5, 3, c. 42.

ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents; and therefore the statute of 31 Edw. III. c. 11 provides that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand: who are only the officers of the ordinary appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted to be the *next of blood* that is under no legal disabilities. The statute, 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge, and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

“Upon this footing stands the general law of administration at this day.”

And upon the same principle the law as to the person entitled to the grant, still stands. Only the authority to make the grant is vested in the Probate Division of the High Court as the ultimate successor to the jurisdiction formerly exercised by the Ecclesiastical Courts.

(2) *Who is capable of making a last will and testament.*—Every person has full power and liberty to make a will that is not under some special incapacity in the eye of the law. The incapacities for this purpose recognised by law are practically reducible to two, namely, *infancy* and *insanity*.

Infancy.—Before the Wills Act, 1837 (1 Vict. c. 26), the Ecclesiastical Courts, following the rule of the civil law, which is still followed in Scotland in regard to wills of moveable (or personal) property, presumed the testamentary capacity of an infant having attained the age of fourteen, if a male, or twelve if a female. But now by the (English)

Wills Act, 1837 (1 Vict. c. 26), s. 7, it is enacted that no will made by any person under the age of twenty-one years shall be valid.

Insanity or unsoundness of mind.—Where this assumes the form of the total or almost total want of intelligence commonly termed *idiocy*, there can be no question as to the want of testamentary capacity. But amongst the varying shades of aberration or weakness of mind, delusions, or eccentricity which, in the popular sense, constitute indications of insanity, the question of testamentary capacity is sometimes an extremely difficult one; and there has been much fluctuation of legal opinion as to the principle on which the question should be determined. According to modern authority, the criterion of capacity to make a will is, whether at the time of making it the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it: *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549; 39 L. J. Q. B. 237; 16 Ruling Cases 702, 713; *Murfett v. Smith* (1887), 12 P. D. 116; 56 L. J. P. 87.

Under the old law there were other disabilities which deserve a passing notice. Before the Married Women's Property Act, 1882, the will of a married woman was not valid so as to be admissible to probate unless made in pursuance of an agreement before marriage, or of an agreement after marriage for a consideration, or if the husband assented to the particular will and survived her. Where a woman was married before the 1st of January, 1883, the old law still applies to property to which she acquired title before that date, and to this extent the disability still may require consideration. But where a woman married before that date has made a will and afterwards becomes a widow, it is not now necessary for her to republish the will in order that it may take effect (according to sect. 24 of the Wills Act, 1837), as if it had been executed immediately before her death: Married Women's Property Act, 1893 (56 & 57 Vict. c. 63, s. 3).

Formerly traitors and felons from the time of conviction became incapable of making a will. For their goods and chattels had become forfeited. So where a deceased was found *felo de se*, for then his goods and chattels were forfeited. Now by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), these causes of forfeiture were entirely abolished. Formerly outlaws also, though it be but for debt, were incapable of making a will, so long as the outlawry subsisted, for the reason that their goods and chattels were forfeit during that time. But outlawry in civil proceedings is now abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), so that the only remaining cause of forfeiture is outlawry on a criminal proceeding.

By the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), certain disabilities are imposed on the convict during his lifetime; and the Crown has the power (sect. 10) of appointing an administrator in whom the estate vests, and who is empowered to dispose of the property, and out of the proceeds to pay costs, etc., and to make allowances for the support of the convict and his family. Subject thereto the administrator is (sect. 18) to hold the property in trust, and may accumulate the income for the benefit of the convict and his heirs or legal personal representatives, or such other persons as may be lawfully entitled thereto, according to the nature thereof. So that, subject to the temporary estate of the administrator and the charges imposed by the Act, the estate remains at the disposal of the convict by his will, which, according to the Wills Act, 1837, takes effect as from his death.

(3.) *As to the nature and incidents of a testament.*—A testament is well defined as “the legal declaration of a man’s intention which he wills to be performed after his death.”

Formerly nuncupative wills, by which the will of a person was declared orally, were admitted, upon the evidence of a sufficient number of witnesses and under certain conditions of urgency. The conditions under which a will so made could be valid were much restricted by the

Statute of Frauds (29 Car. II. c. 3). And under the Wills Act, 1837 (1 Vict. c. 26), it was provided (by sect. 9) that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed [at the foot or end thereof] by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. By sect. 11 of this Act it was enacted that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act. This allowed, in the case of a soldier on active service, or of a seaman at sea, the power of making a nuncupative will; but this was under the conditions of various Acts (26 Geo. III. c. 63; 32 Geo. III. c. 34, s. 1; 11 Geo. IV. c. 20, ss. 48, 49, 50; and 2 & 3 Will. IV. c. 40, ss. 14 and 15) which are not affected by the Wills Act, 1837. The expression "at the foot or end thereof" contained in the Act of 1837, being strictly interpreted, led to some doubt and difficulties, which were removed by the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), which gave effect to any signature so placed that it should be apparent on the face of the will that the testator thereby intended to give effect to the writing as his will.

As to what is a signature it has been decided that a mark is sufficient although the testator was able to write, and the signature by initials was, therefore, of course sufficient.

By the Wills Act, 1861 (24 & 25 Vict. c. 114), the wills of British subjects, as regards personal estate, if made abroad, were made valid—

- (a) by the law of the place where made; or
- (b) by the law of the place where the testator was domiciled when the will was made; or

(c) by the law then in force in that part of His Majesty's dominions where he had his domicile of origin.

If made within the United Kingdom, were made valid, if executed according to the forms required by the law for the time being in force in that part of the United Kingdom where the same was made.

Thus, having regard to the fact that in Scotland a holograph will, that is to say, a will entirely in the handwriting of the testator and signed by him, is a valid will; a holograph will made abroad by a person having his domicile of origin in Scotland is valid, as regards his personal estate, and may be admitted to probate in England or confirmation in Scotland. And so, if a British subject, whether English, Scotch, Irish, or Colonial, makes a holograph will in Scotland, it will be a valid will for the disposal of his personal estate.

Apart from statute, the law of England as to personal estate required that a will should be executed according to the law of the place where the testator was domiciled at the time of his death. The law of Scotland, more liberally, permitted a will to be made either according to the law of the place of domicile at the time of death, or according to the law of the place of execution. It is accepted as law everywhere that a will is valid, as to personal estate, if made according to the place where the testator had his domicile at the time of making the will and at death: see *Enohin v. Wylie*, and notes, 2 Ruling Cases 56-77.

As to what was an effectual revocation of a will, there was, before the Wills Act, 1837, much room for question. The question was narrowed by the provisions of that Act.

By sect. 18, every will made by a man or woman is revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the Statute of Distribution.

By sect. 19, no will shall be revoked by any presumption

of an intention on the ground of an alteration of circumstances. And, by sect. 20, no will or codicil or any part thereof shall be revoked, otherwise than as aforesaid (*i.e.* by marriage), or by another will or codicil or writing executed in manner in which a will is required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. And (by sect. 21) no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as is required for the execution of a will.

(4.) *What an executor and administrator are, and how they are appointed.*—An executor is he to whom another man commits by will the execution of that his last will and testament. All persons are capable of being executors that are capable of making wills, and others besides. Infants may be made executors; although no infant can act until the age of seventeen years; until which time administration must be granted to some other, *durante minore ætate*. In like manner, when the executor is out of the realm, administration may be granted *durante absentia*. And when a suit is commenced touching the validity of the will, administration is granted *pendente lite*.

The appointment of an executor by a will may be either in express words or by a strong implication of intention. In the latter case, the person indicated is said to be executor by the tenor of the will. If no executor is named or indicated the will is said to be incomplete, and administration is granted to some other person *cum testamento annexo*. And the same is done if the testator has named persons as executors who are incapable, or if the executors named refuse to act. This is in accordance with what was already settled law in the time of Henry II., as Glanville informs us, that "*testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit: si vero testator*

nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere."

But if the deceased died wholly intestate, without either making a will or appointing executors, then general letters of administration are granted, following the practice of the Ecclesiastical Courts, and the directions of the Statutes of Edward III. and Henry VIII. already mentioned (a). In the application of these statutes the following rules have been settled:—*First*, That the surviving husband is entitled, as of right, to the administration of the personal estate of his deceased wife, and the same right becomes vested in the representatives of the surviving husband. *Secondly*, That where the intestate leaves a widow the Court has a discretion, under the statute 21 Hen. VIII. c. 5, to make the grant to the widow or next of kin. *Thirdly*, That among the kindred those are to be preferred that are nearest in degree to the intestate; but between persons in equal degree the Court may exercise its discretion, and to this it must be added, in regard to estates of intestates dying after 1st January, 1898, that the heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin (60 & 61 Vict. c. 65, s. 2 (4)). *Fourthly*, That the propinquity of degree is reckoned according to the computation of the civilians, so that the intestate himself, and not the common ancestor (according to the rule of the canonists), is the *terminus a quo* the several degrees are numbered. But, although children and parents are in the first degree, the children are preferred in administration to the parents. In the next degree follow brothers, grandfathers, uncles, or nephews (and the females of each class respectively), and, lastly, cousins. *Fifthly*, That the half-blood is admitted to the administration as well as the whole, for they are the kindred of the intestate; and only postponed (and formerly excluded) from inheritance of land upon feudal reasons. *Sixthly*, That if none of the kindred will take out administration, a creditor may, by custom, do it. *Seventhly*, That if the executor refuses, or dies intestate,

(a) See p. 278, *supra*.

the administration may be granted to the residuary legatee, in exclusion of the next of kin. And, lastly, in default of all these, the Court has a discretion, as the ordinary had (even before the statute of Edward III.), to grant the administration to such discreet person as he approves of; or may grant letters *ad colligendum bona defuncti* in order to preserve the estate. Where there are no kindred, as in the case of a bastard who leaves no wife, or child, the Court will grant administration to the person appointed by the Crown, who is usually one of the kindred according to nature.

Apart from the rules of administration, it has been decided that the surviving husband is entitled, as of right, to the administration of the personal estate of his deceased wife; and the Court has no discretion to grant it to any one else: *Sir George Sands' Case* (K. B. 1663), 3 Salk 22; 2 Ruling Cases, p. 98.

There has been much discussion as to the principle on which the surviving husband is entitled to the grant. In *Sir George Sands' case* it was said by HOLT, C.J., that this was not within the statute 21 Hen. VIII. c. 5, but within the statute 31 Edw. III. stat. 1, c. 11. A different view of the right of the husband is given by Lord LOUGHBOROUGH in *Watt v. Watt* (1796), 3 Ves. 244. He says (at p. 247), "He is entitled to the personal property of his wife *jure mariti*; her personal property vests in him by the marriage. At the death of his wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration is granted to him as husband; and when you look to the statutes, there is no law that gives the husband a right by force of the statute to administer to his wife. The husband's right is supposed in all the statutes." Perhaps the true explanation is that, however arbitrary the practice of making these grants may have been before the statute, they must usually have been made to the husband as having the property at common law; and that, after the statute, the practice became settled in accordance with the right of property.

Whatever the origin of the rule, it had become, before the recent changes in the law as to the property of married women, the settled practice of the Court to make the grant of administration to the husband or his representative in preference to the wife's kindred. And where the surviving husband was deceased, representation to him, as well as to the wife, was necessary to complete the administrator's title to her outstanding estate. *In the goods of Harding* (1872), L. R. 2 P. & D. 394; 41 L. J. P. & M. 65; *Partington v. Attorney-General* (1869), L. R. 4 H. L. 100; 33 L. J. Ex. 281.

Since the Married Women's Property Act of 1882, it became important to consider the origin and reasons of the practice by which the husband takes the administration. By that Act (45 & 46 Vict. c. 75, s. 1) a married woman is made capable of holding and disposing of property as her separate property "as if she were a feme sole."

It had long been settled by the Courts of Equity that where a married woman has property held for her separate use, although she can make a will of such property (*Fettiplace v. Gorges* (1789), 1 Ves. Jr. 45; 1 R. R. 29), yet, upon her death intestate, the separate use was exhausted and the property went to the husband *jure mariti*: *Cooper v. Macdonald* (1877), 7 Ch. D. 288, at p. 296; 47 L. J. Ch. 373.

The effect of the decisions upon the Act of 1882 is to construe the words "as if she were a feme sole," as equivalent to "as if the property had been granted, assigned, devised, or bequeathed to her for her separate use." Thus, the husband is still entitled as administrator to her undisposed of personalty; and if another takes out administration, the husband, and not the next of kin of the wife, is entitled, as he would have been before the Act: *Re Lambert's Estate, Stanton v. Lambert* (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; *Smart v. Tranter* (1890), 43 Ch. D. 587; 59 L. J. Ch. 363; *Surman v. Wharton*, 1891, 1 Q. B. 491; *In re Scott, Scott v. Hanbury*, 1891, 1 Ch. 298; 60 L. J. Ch. 461. And upon the same principle it has been decided

that the husband's right as tenant by the courtesy is unaffected: *Hope v. Hope*, 1892, 2 Ch. 336.

The interest vested in the executors by the will of the deceased may be continued and kept alive by the will of the same executor; so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself; but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of A. is merely the officer of the Court prescribed by the Act of Parliament, in whom the deceased has reposed no trust at all, and, therefore, on the death of that officer it becomes necessary for the Court to appoint another. And with regard to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the cause of representation from executor to executor is interrupted by any one administration, it is necessary for the Court to commit administration afresh of the goods of the deceased not administered by the former executor or administrator. And this *administrator de bonis non* is the only representative of the deceased in matters of personal property. But such an administrator may, as well as an original administrator, have only a limited or special administration committed to his care, namely, the administration of certain specific effects, such as a term of years and the like, the rest being committed to others.

(5.) *The duties (generally) of executors and administrators.*—The duties, in general, are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor;

and, secondly, that an executor may do many acts, such as bringing an action to recover the assets of the estate, or assenting to a legacy, before he proves the will, but an administrator may do nothing until letters of administration are issued; for the former derives his power from the will and not from the probate, the latter owes his authority entirely to the appointment of the Court. If a stranger takes upon him to act as an executor, without any just authority (as by intermeddling with the goods of the deceased, and many other transactions), he is called an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages; but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such intermeddling as will charge an executor of his own wrong. An executor *de son tort* cannot bring an action himself in right of the deceased, but actions may be brought against him. And in all actions by creditors against such an officious intruder he may be named an executor, generally; for the most obvious conclusion which strangers can form from his conduct, is that he has a will of the deceased, wherein he is named executor, but has not yet taken probate thereof. He is chargeable with the debts of the deceased, so far as assets come to his hands, and as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. And although, as against the rightful executor or administrator, he cannot plead such payments, yet it shall be allowed to him in mitigation of damages; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt.

The duties which devolve upon executors and administrators alike are as follows:—

1. He must bury the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, in priority to all other debts and charges; but if an executor or administrator be extravagant,

it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.

2. The executor, or the administrator *durante minore actate*, or *durante absentia*, or *cum testamento annexo*, must prove the will of the deceased, which is done either in common form, which is only upon his own oath or affidavit, or *per testes*, in more solemn form of law, before the Court, in case the validity of the will be challenged. When the will is proved, the original must be deposited in the registry, and a copy thereof in parchment is made out under the seal of the Probate Division of the High Court. In default of a will, the person entitled to be administrator must take out letters of administration under the seal of the Court. By these, power to collect and administer, that is to dispose of the goods of the deceased, is vested in him, and he must by the Statute of Distribution (22 & 23 Car. II. c. 10) enter into a bond with sureties faithfully to execute his trust.

3. The executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action of the deceased, and to exhibit the same on oath on being lawfully required to do so.

4. He is to collect all the goods and chattels so inventoried, and to this end he has full powers conferred on him by law; being the representative of the deceased, and having the same property in his goods as the deceased had when alive, and the same remedies to recover them. If there are two executors, a sale or release by one of them is good against all the rest: but in case of administrators it is otherwise. Whatever is recovered that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator; that is, sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him. For:

5. The executor or administrator must pay the debts of the deceased. In payment of debts, he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, *first*, he may pay all funeral charges (suitably incurred) and the expense of proving the will. *Secondly*, debts due to the King on record or specialty. *Thirdly*, debts to which priority over judgment debts is given by particular statutes. But, where the estate is being administered in bankruptcy, it will have to be considered how far the particular statute is overridden by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 40): *Re Williams Jones v. Williams* (1887), 36 Ch. D. 573; 57 L. J. Ch. 264. *Fourthly*, judgments in Courts of Record, if duly registered under the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38): *Van Gheluwe v. Nerinckx* (1882), 21 Ch. D. 189; 51 L. J. Ch. 929. *Fifthly*, judgments against the personal representatives whether registered or not: *Re Williams' Estate, Williams v. Williams* (1872), L. R. 15 Eq. 270; 42 L. J. Ch. 158, provided final judgment is signed against the representatives before a decree of administration: *Re Stubbs' Estate, Hanson v. Stubbs* (1878), 8 Ch. D. 154; 47 L. J. Ch. 671. *Sixthly*, specialty and simple contract debts. Formerly specialty debts had the priority over debts by simple contract; but this priority was abolished by the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46). Among debts of equal degree, the executor or administrator (duly constituted) is allowed to pay himself first, by retaining in his hands so much as the debt amounts to. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or not, provided there be assets sufficient to pay the testator's debts: for, although this discharge of the debt takes place in priority to legacies, it would be unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. Also if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, although he should

leave nothing for the rest: for, without a suit commenced, the executor is not charged with notice of the debt.

6. Next to the discharge of the debts, the legacies are to be paid by the executor so far as the assets extend. But the executor is not preferred in his legacy to other legatees, as he is, in his debt, to other creditors.

A legacy is a bequest, or gift, of goods and chattels by testament, and the person to whom it was given is styled the legatee. The bequest transfers an inchoate property to the legatee, but the property is not fully vested in the legatee without the assent of the executor. For in the executor all the chattels are vested, and it is his business to see whether there is a sufficient fund left to pay the debts of the testator. And in case of a deficiency of assets, all the general or pecuniary legacies (*i.e.* of so much money) must abate proportionately, in order to pay the debts; but a specific legacy (of a certain piece of plate or horse) is not to abate at all, or allow anything by way of abatement, unless there be not sufficient without it. And if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part in case debts come in more than sufficient to exhaust the residue after the legacies paid.

If the legatee dies before the testator, the legacy is lost or lapsed legacy, and sinks into the residue. And if a contingent legacy be left to any one—as when he attains, or if he attains, the age of twenty-one—and he dies before that time, it is a lapsed legacy. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in præsentî*, although it is to be paid *in futuro*; and if the legatee dies before that age, his representatives shall receive it out of the testator's estate, at the same time that it would have become payable, in case the legatee had lived.

Of a similar effect to a legacy is what is called a donation *mortis causâ*. That is when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, including banknotes or bonds to bearer, which pass by

delivery, to keep in case of his decease. There is in such a gift an implied trust in the donee if the donor recovers, to give the property back : but if the donor dies, and the gift is complete so as to require nothing more to vest the property, the gift takes effect, and so far differs from a legacy by testament that it does not require the assent of the executor to complete the legal title. Yet it is subject to the claims of creditors, and is liable to legacy duty under the Revenue Act, 1845 (8 & 9 Vict. c. 76, s. 4), and to stamp duty under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12, s. 38), or estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30, s. 2 (1) (c)).

7. When all the debts and legacies, whether of specific property or certain sums of money, are discharged, the surplus or residue of the personal estate and likewise (where the will has been made or republished since the year 1837) the real estate not specifically bequeathed or applied for the payment and satisfaction of such debts and legacies, must be paid to the residuary legatee, if any be appointed by the will. If there is no residuary legatee, it was for a long time a settled notion that the residue of personalty devolved to the executor's own use, by virtue of his executorship. At a later period the rule was understood to be that, although where the executor had no legacy at all, the residue (of the personal estate) should in general, be his own, yet wherever there was sufficient on the face of a will (by means of a competent legacy or otherwise) to imply that the testator intended his executor should not have the residue, the undivided surplus of the estate should go to the next of kin, according to the Statute of Distributions (22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 3, s. 25) relating to the estates of intestates ; so that, where there was sufficient implication of the intention that the executor should not have the residue, the executor stood upon the same footing as the administrator. The rule so understood was altered by the Executors Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 40), as to the estates of persons dying after the 1st of September, 1830 ; and, under this statute, the executor is a

trustee for the person or persons (if any) entitled to the estate under the Statute of Distributions “in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially.” By the second section of the statute, the enactment was not to affect or prejudice any right to which any executor, if the Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator’s estate under the Statute of Distributions in respect of any residue not expressly disposed of.

On the interpretation of this statute, an important opinion is expressed by Lord CAIRNS in the case of *Williams v. Arkle* (H. L. 1875), L. R. 7 H. L. 606 ; 45 L. J. Ch. 590, as follows: “I cannot entertain any doubt that this statute did not introduce any new rule for the construction of wills. It provides that an executor shall be a trustee for the next of kin, unless it shall appear by the will that he is to take the residue beneficially. That is to say, he shall no longer take the residue by implication of law. If the residue is given by the will to the executor, the Court must decide the effect of the gift upon the construction of the will, and upon general principles applicable to that construction, just as before the statute it would have construed a similar gift of real estate. The statute, therefore, has of necessity no application where there is an express gift of residue. In my opinion the statute was intended to apply only in those cases where the rule or presumption of law could be held to operate, and that where an express devise of residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction.”

The effect of the second section of the statute of 1830 is to leave the older law untouched in the case of personal estate which, if undisposed of, would fall to the Crown in default of next of kin. In a case where, by implication according to the older law, the executor would have been entitled, as against the Crown, to hold the residue, he is

still entitled to do so: *Re Knowles, Roose v. Chalk* (1880), 49 L. J. Ch. 625. But where the older law would have raised a presumption against the executor's beneficial right, the executor is regarded as a trustee for the Crown as coming in place of next of kin: *Chester v. Chester* (1871), L. R. 12 Eq. 444.

After all the above duties are fulfilled, and in default of a residuary legatee, the surplus of the estate, whether under an executor or administrator is distributed, as already mentioned, according to the Statute of Distributions. By this statute (22 & 23 Car. II. c. 10) it is, in effect, enacted that the surplus of intestate's estates be distributed in the following manner: one-third goes to the widow, and the residue in equal proportions to the children, or, if dead, to their lineal descendants (*per stirpes*). If there are no children or descendants of children, then a moiety goes to the widow, and the rest to the next of kin equally—deceased brothers and sisters being represented by their children, but no further representatives among collaterals being admitted. And if there is neither widow nor child, the whole is distributed among the next of kin as above. By sect. 25 of the Act (29 Car. II. c. 3) it is explained that the Statute of Distributions does not extend to the estates of feme coverts that die intestate, but that their husbands may demand and have administration of their personal estates, and recover and enjoy the same, as they might have done before the making of the said Act. It has been already shown (p. 286, *supra*) that the husband's right to take out administration to the estate of his deceased wife is not altered by anything in the Married Women's Property Act, 1882. The same observation applies to the husband's right to enjoy the property; so that a surviving husband is still beneficially entitled to the property of his deceased wife undisposed of by her will just as he would have been by the common law independently of the Statute of Distributions and the Married Women's Property Acts.

It is obvious that the rules for the distribution of the intestate's effects under the statute are modelled upon the

ancient rule for the distribution of the estate which formerly prevailed, as above stated (at p. 284, *supra*), in all cases, whether the deceased left a will or not.

By the Statute of Distributions it is further provided that no child of the intestate (except his heir at law), on whom he settled in his lifetime any estate in lands or pecuniary portion, shall have any part of the surplus further than would make an equal distribution with the other children. This provision is analogous to the *collatio bonorum* of the Roman law, and is probably founded on the ancient custom which prevailed in London and in the province of York, and is still observed in the law of Scotland.

The distribution amongst the next of kin in equal degree is *per capita*; but where representation is admitted, those taking by representation take *per stirpes*. So that, if the next of kin be the intestate's three brothers, A., B., and C., here his effects are divided into three equal portions, and distributed *per capita*, one to each; but if one of these brothers (A.) had been dead, leaving three children, and another (B.) leaving two, then the distribution must have been *per stirpes*, namely, one-third to A.'s three children, equally amongst them; another third to B.'s two children; and the remaining third to C., the surviving brother. And if C. had also been dead without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own right *per capita*, namely, one-fifth part each. Further, as the statute has expressly declared that there shall be no representation among collaterals after the brother's and sister's children; if A., the brother of the intestate, be dead, leaving only grandchildren, and B. be dead, leaving children, and C. be still living, the grandchildren of A. have no share, but one-half goes to the children of B., and the other half to C.

In calculating the degrees of relationship to ascertain who are next of kin according to the Statute of Distributions, the general rule is that of the civil law, namely, that each step upwards to the ancestor or common ancestor, and downwards again to persons to be considered, counts as a degree. Thus

the surviving father is nearer of kin than a brother or sister, and in default of children he takes the moiety (if the intestate left a widow), or the whole (if he did not) of the effects. As to the mother, she is, no doubt, according to the above rule, in the same degree of relationship as the father. But if both were alive the father, of course, became entitled either in his own right or in hers. If the mother alone had survived, she was, before the statute 1 Jac. II. c. 17, entitled as the intestate's next of kin, in the first degree, to his whole personal estate. But, by sect. 7 of that statute, it is provided, that if after the death of a father any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her.

This enactment has been construed, in case of the death of the intestate leaving a widow, but no children, to mean that, the widow taking her moiety, the other moiety is shared by the intestate's brothers and sisters as well as the mother: *Keilway v. Keilway*, 2 P. Wms. 344. Again, where the intestate left a widow, a mother, and nephews and nieces, the children of a deceased brother, it was held that a moiety should go to the widow and the other moiety should be divided so that one-half (or one-fourth part of the whole estate) should go to the widow, and the other half (or one-fourth of the whole estate) to be divided amongst the nephews and nieces as representing the deceased brother: *Stanley v. Stanley*, 1 Atk. 455.

If the intestate is survived by his mother, but not by any wife, child, father, or brother or sister, or child of a brother or sister (to take as representing the parent), the case is outside the statute of James II., and the whole of the effects devolve (as before the statute) upon the mother.

If the intestate left neither direct descendants nor parents, but left brothers and sisters and a grandfather or grandmother, then, according to the general rule above stated, the grandfather or grandmother ought to share equally with the

brothers and sisters. But it has become settled law, according to the decisions, that in such a case the brothers and sisters are preferred, and the grandparent takes no share. But a grandfather or grandmother is reckoned nearer of kin than, and therefore preferred to an uncle or aunt. And a great-grandfather or great-grandmother is entitled to a distributive share with uncles and aunts.

In the sharing of intestate's personal estate there is no distinction between whole and half blood, nor is there any preference or distinction between a relationship through the father or in a male line, and one through the mother or in a female line. But, excepting the right of the intestate's widow, no title to a share in the intestate's effects arises by affinity, or relationship by marriage.

CHAPTER XXXI.

RIGHTS IN SECURITY OVER MOVEABLES.

RIGHTS in security over lands, etc., have been briefly noted on p. 155, *supra*.

It will be seen, from what has been there said, that the person having a legal, as distinguished from a merely equitable right in security over land, must be *seised*, whether by way of actual possession or by some fiction of law, of which the most remarkable, in English law, is that introduced by the Statute of Uses.

The term "seised" or "seisin" is now commonly used only in relation to what are called freehold estates in land. The equivalent words used in relation to moveable goods or chattel interests (*e.g.* estates for years) in land are "possessed" and "possession." That the word "seised" was, by English lawyers in the thirteenth and fourteenth centuries, applied to goods as well as land, has been shown by Professor Maitland in a learned article in the *Law Quarterly Review* (vol. i., p. 324). How, in relation to moveable goods or chattel interests in land, the words "possessed" and "possession" (borrowed from the Roman law) came to be exclusively

applied, is ingeniously explained by the same writer. But, whatever may be the explanation, the words "seised" and "seisin" have become, in the current language of modern writers, appropriated to the freehold estates in land and associated with the legal fictions which have grown up round the original notion of "seisin" as implying actual exercise of the rights of the owner present on the land. For the analogous condition in relation to moveables the exclusive use of the words "possessed" and "possession" has become inveterate.

It has been shown that, either by the common law or by means of the statute of uses, successive "estates" may be created in lands, tenements, and hereditaments. There is no similar means of dividing the paramount title to personal property. As to personal property in a tangible moveable thing, a legal right in security conferring a qualified ownership may be constituted in the ways presently to be mentioned. But as to other personal property, such as stocks in the funds, etc., the paramount ownership is indivisible, and the only way of qualifying or dividing the property is by way of trust.

To describe the most ordinary right in security over a tangible moveable thing, the case is supposed of the owner in actual possession desirous of making it a security for borrowed money; so, however, as to part with no more of his right than is necessary for this purpose. The creditor will, of course, insist upon the possession, and the owner will give up the possession, but upon condition that on the debt being duly paid the possession is to be restored to him, and that in the mean time the property remains his, subject only to the possession of the creditor and such right of ownership in the creditor as the transaction implies. Such a transaction is called a pledge.

Under a pledge of the usual type, a certain period is stipulated or allowed for the redemption of the thing pledged by payment of the debt; and, after the expiration of that period, default in payment having been made, the pledgee is entitled to sell the goods. In the mean time he

may repledge the goods by delivery to another, under conditions of redeeming them on the same terms as they were redeemable under the original contract. So that the pledgor cannot claim the goods from the person with whom they have been repledged, without tendering the sum of money by which he might have redeemed them from the original pledgee: *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; 35 L. J. Q. B. 232; 21 R. C. 301. But while the term for payment is unexpired, the pledgee has no power either to sell the goods or to pledge them so as not to be redeemable upon the same conditions as those upon which they are redeemable in his own hands.

Such are the ordinary rights at common law as between the pledgor and pledgee; and, where a landlord distrains goods for rent, or a parish officer for taxes, the goods in the hands of such distrainer or parish officer, until lawfully sold, are for the time held as a pledge; and the holder is bound by an implied contract in law to restore them on payment of the debt, and expenses, before the time of sale, or when sold to render back the overplus.

The powers of a pledgee in dealing with persons having no privity with the original contract of pledge are extended (1) by the principles of *Market Overt*, (2) by the usage, sanctioned by law in regard to negotiable instruments; and (3) by the operation of the statutes commonly called *The Factors Acts*.

(1) The pledgor's right is liable to be defeated by a sale by the pledgee in *market overt*. Such a sale, as above shown (a), may defeat any title, not clothed with actual possession, to tangible moveable goods.

(2) So, where a negotiable instrument is transferred by way of pledge, the title of the pledgor may be defeated by the pledgee negotiating the instrument without the purchaser having notice of the terms on which he held it.

(3) The powers of the pledgee, being a "mercantile agent," in dealing with persons who have no notice of the special terms upon which possession was delivered to

(a) See p. 257, *supra*.

him, have been much extended by the series of Acts called the "Factors Acts," which have been consolidated and amended by the Factors Act, 1889 (52 & 53 Vict. c. 45), of which the leading provisions (relating as well to the effect of a pledge as to that of a sale by the mercantile agent) are above set forth (p. 254, *et seq.*, *supra*).

A *lien* is a right in security over moveables differing from a pledge in so far : (1) it arises, speaking generally, not by express contract, but by implication of law from a legal relation having some other primary purpose ; (2) it is, in its essential character, personal and not assignable ; and (3) it gives no right of sale, or of dealing with the goods otherwise than by retaining them until the lien is satisfied.

A lien may be specific or general. Of specific liens, one of the best known is that of a common carrier, who is entitled to retain goods delivered to him for carriage until the price of the carriage is paid. A specific lien arises in every case where a chattel is delivered to a person for the purpose of altering, improving, or otherwise working on it. Such a person is entitled to retain the chattel until paid or satisfied in respect of the labour and expense done and incurred in respect of the chattel. A general lien is the right to retain a chattel in security not only for the sum due in respect of that chattel, but also the amount due on a general balance of account arising upon transactions in that class of business in the course of which the chattel has been delivered.

A general lien is not favoured by any general implications of law, but depends upon a usage of trade to be proved, or, after being judicially ascertained, to be judicially recognised : *Brandao v. Burnett* (1846), 12 Cl. & Fin. 787 ; 3 R. C. 592. A general lien by usage has been judicially recognised in the following businesses :—That of attorneys or solicitors upon papers of the client coming to their hands in the course of their professional employment ; that of bankers upon all bills and securities of the customer sent to the bank to be realised and placed to his (the customer's)

credit; but not extending to securities deposited with the banker for a special purpose: *Brandao v. Burnett* (*supra*); or to the contents of boxes deposited with the banker for safe custody: *Leese v. Martin* (1873), L. R. 17 Eq. 224; 43 L. J. Ch. 143; that of brokers, calico printers, dyers, factors, warehouse-keepers, and wharfingers. Where the person in possession having such a lien is a “mercantile” agent within the meaning of the Factors Act, 1889, above cited, the rights of the owner subject to the lien may be defeated by the dealings of the agent with a third person, just as if he had been a pledgee in the proper sense of the term.

Besides the rights of lien arising by the delivery of goods by the owner for a certain purpose, there is the right in security commonly called the vendor’s lien, which is a right in security arising out of his original ownership after he has, by a sale of the goods (*a*), transferred the general property to another. So long as he retains the possession, and unless there is, under the contract of sale, a term of credit still running, and the buyer is solvent, the vendor has a right in security for the payment of the price. And although the vendor has parted with the possession by delivering the goods to a forwarding agent for the buyer, his right in security revives on the buyer becoming insolvent and on the vendor stopping the goods *in transitu*; that is to say, giving such notice to the forwarding agent as in the due course of business would reach the person having the actual custody before the completion of the transit: *Litt v. Cowley* (1816), 7 Taunt. 169; 23 R. C. 411.

The law relating to the vendor’s lien is now expressly enacted by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). The sections (41–48) of the Act, which substantially reproduce a quantity of previous case law, are as follows:—

“41.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(a) See p. 250, *supra*.

“(a) Where the goods have been sold without any stipulation as to credit :

“(b) Where the goods have been sold on credit, but the term of credit has expired :

“(c) Where the buyer becomes insolvent.

“(2) The seller may exercise his right to lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

“42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

“43.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

“(a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

“(b) When the buyer or his agent lawfully obtains possession of the goods ;

“(c) By waiver thereof.

“(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

“44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu ; that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

“45.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of

transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

“(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

“(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

“(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

“(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

“(6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

“(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

“46.—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it

to his servant or agent in time to prevent a delivery to the buyer.

“(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

“47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

“Provided that where a document of title to goods has been lawfully transferred to any person or buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

“48.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

“(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

“(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the

goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

“(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.”

By the definition contained in sect. 62 of the Act, “document of title” has the same meaning as it has in the Factors Acts. These are the Factors Act, 1889 (52 & 53 Vict. c. 45), and the Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40); and the definition of “document of title,” which applies to both, is contained in sect. 1 of the former Act (*a*).

So far the rights in security over moveable chattels depend upon possession; and the same principles apply as well to English law as to other systems of law which, speaking generally, treat possession as essential to the acquisition of a title to property in such things. But there are also rights in security over moveable goods of which the person having the right in security has not obtained possession. Such a right must, as against the possessor, be essentially a right of action; since, in order to acquire the complete title against the possessor who refuses to give effect to it, an action of some kind is necessary. In the systems of law which adopt the expression of the Roman law, a right in security over moveables, of which the possession remains in the debtor, is generally denoted by some rendering of the word *hypotheca*. In English law such a right is comprehended under the term “mortgage.” These terms mark a difference in the theory of the right which is attended with some practical effects. *Hypotheca* is regarded as a qualified right of property grafted on the paramount right of the owner. The “mortgage” of English law implies the paramount right of property in the secured creditor, only subject to a condition, or right of redemption, in the debtor.

(*a*) See p. 255, *ante*.

It has already been shown that, according to English law, an immediate sale of specific goods passes the property to the buyer in accordance with the intention of the contract, subject only to the vendor's lien, which subsists only so long as he retains the actual possession. But the common law of England has gone further in giving effect to the intention of a solemn instrument dealing with the property in moveable goods. Where a deed is made under seal, expressing the intention to pass the property in moveable goods subject to a condition, so as, in effect, to create a mortgage of the chattels, the property passes accordingly, and this although the grantee does not take away the goods or become possessed of them. It is true that the fact of the goods being left in the possession of the debtor might, with other circumstances, be regarded as an indication of fraud, and if fraud were found by a jury, the transaction might be set aside in favour of a creditor who was defrauded. But unless the transaction was proved to be a fraud, the legal title of the person to whom the property was so conveyed held good against everybody.

The common law, in thus giving facilities for dealing with the property in moveable goods without regard to the facts of possession, was found to bear hardly on creditors, who, while in ignorance of the transaction by which their debtors' apparent property had been conveyed away, were not in a position to prove the transaction to be a fraud. To remedy this mischief has been the aim of a crowd of statutory enactments.

The statute of Elizabeth (13 Eliz. c. 5), already mentioned (at pp. 198, 245), may here be again referred to in connection with this subject. This established a certain presumption of fraud where the transaction was simply gratuitous.

Another statutory enactment with a similar object was that of 21 Jas. I. c. 19, s. 11, which established in favour of the creditors of a bankrupt the principle of reputed ownership. This remains embodied in the existing law of bankruptcy (see p. 272, *ante*). The principle appears to

have been borrowed from the law of Scotland. There it has long been held as law, whether bankruptcy ensues or not, that if A. allows B. to assume the appearance of substantial property by remaining in possession of goods which belong to A., A. shall not be entitled to claim the goods against those who have given credit to B. on the strength of the appearances.

But these enactments were not sufficient to obviate the mischief described in the preamble of the Act next cited. In the year 1854 an Act (17 & 18 Vict. c. 36) was passed, entitled "An Act for preventing Frauds upon Creditors by secret Bills of Sale of personal chattels." The preamble stated that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors." This Act of 1854 gave rise to numerous questions decided by various cases, the effect of which is embodied in the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), of which a summary is given below. The passages in italics give the effect of case law which had grown up around the Act of 1854, or of amendments which the cases had shown to be necessary for the objects intended.

The Bills of Sale Act, 1878, applies to all bills of sale executed after January 1, 1879. By sect. 4, the following expressions are thus defined:—

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, *inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods* (a), and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take

(a) As to a receipt for purchase-money upon a purchase which was a mere colourable sale to cover a loan transaction, see *Maas v. Pepper*, 1905, A. C. 102.

possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants, or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

“The expression ‘personal chattels’ shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (*when separately assigned or charged*) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (*except trade machinery as hereinafter defined*) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stocks, funds, or securities of any government, or in the capital or property of incorporated or joint-stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:

“Personal chattels shall be deemed to be in the ‘apparent possession’ of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.”

The remaining sections of the Act are, in effect, as follows:—

5. “*Trade machinery*” (as included in “personal chattels”) means *the machinery used in or attached to any factory or workshop, exclusive of (1st) the fixed motive powers, such as water-wheels and steam-engines, etc.; (2ndly) the fixed power machinery, such as shafts and wheels, etc., transmitting the action of the motive powers; and (3rdly) the pipes for steam, gas, and water.*

6. *Every attornment or instrument, not being a mining lease, whereby a power of distress is given in security of a debt, is to be deemed a bill of sale of any chattels which may be seized under the power, provided this is not to extend to a mortgage of land which the mortgagee being in possession has demised to the mortgagor at a fair rent.*

7. *No fixtures or growing crops shall be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land, if by the same instrument any interest in the land is conveyed or assigned to the same person.*

8. “Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also, as

against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court, authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which, at or after the time of *filing the petition* for bankruptcy or *liquidation*, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession, or apparent possession, of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be)." [This section is repealed, *so far as relates to assignments in security*, by sect. 15 of the Act of 1882.]

9. Prevents the evasion of the Act by successive bills of sale, as practised under the Act of 1854. A subsequent bill of sale executed within seven days, and given as security for the same debt as a former bill, declared void.

10. "A bill of sale shall be attested and registered under this Act in the following manner :—

"(1) *The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor :*

"(2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill, and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or

given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed :

“(3) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

“In case two or more bills of sale are given, comprising, in whole or in part, any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

“A transfer or assignment of a registered bill of sale need not be registered.”

11. Provides for the renewal of registration every five years.

12. Prescribes the form of the register.

13. Certain officers of the Court to be registrars.

14. Provides for rectification of register.

15. Provides for entry of satisfaction.

16. Copies may be taken and office copies to be evidence.

17–19. Administrative.

20. Chattels comprised in registered bill of sale not to be in reputed ownership of grantor.

21, 22. Administrative.

23. Repeal of the Act of 1854, and of the Act of 1866.

(which merely provided for the renewal of registration every five years).

24. The Act (like its predecessor) not to extend to Scotland or Ireland. (A similar Act was passed for Ireland in 1879, 42 & 43 Vict. c. 50.)

Hitherto the statutes relating to bills of sale have regarded only the interests of creditors. The Act of 1882 goes further; and while its operation is expressly confined to bills of sale given by way of security for the payment of money, a departure from its provisions is sanctioned by nullity.

The following is a summary of the Act of 1882, and of a short Act of 1890 :—

THE BILLS OF SALE ACT (1878) AMENDMENT ACT, 1882
(45 & 46 VICT. c. 43).

1. Short title.

2. Commencement, November 1, 1882.

3. The Act to be construed along with the Act of 1878, but not to apply to bills of sale given otherwise than by way of security for the payment of money.

4. "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

5. "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale."

6. "Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things (that is to say) :—

“(1) Any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed.

“(2) Any fixtures separately assigned or charged, and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place, in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.”

7. “Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

“(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security :

“(2) If the grantor shall become a bankrupt, or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes :

“(3) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises :

“(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes :

“(5) If execution shall have been levied against the goods of the grantor under any judgment at law :

“Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the

grantee from removing or selling the said chattels, or may make such other order as may seem just."

8. "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England, then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

9. "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

10. "The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section ten of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed."

Sect. 11 contains directions to the Registrar for the purpose of local registration.

12. "Every bill of sale made or given in consideration of any sum under thirty pounds shall be void."

13. "All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

14. "A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such

bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.”

15. “The eighth and the twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act, are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act.”

Sect. 16 contains provisions for the inspection of registered bills of sale.

17. “Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.”

By the 18th section the Act is not to extend to Scotland or Ireland.

The form of bill of sale given in the schedule (and under sect. 9, to be followed under the sanction of nullity) is as follows:—

“This Indenture, made the day of , between A. B., of , of the one part, and C. D., of , of the other part, witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he, the said A. B., doth hereby assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ , on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he

will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

“Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D. for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

“In witness, etc.

“Signed and sealed by the said A. B. in the presence of me, E. F. [*add witness's name, address, and description*].”

THE BILLS OF SALE ACT, 1890 (53 & 54 VICT. C. 53).

This Act exempts from the operation of sect. 9 of the Bills of Sale Act, 1882, instruments or letters of hypothecation relating to goods in the interval between their being discharged from a ship and being warehoused or reshipped. (These documents are used principally at Liverpool.)

It has been seen that Scotland and Ireland are excluded from the operation of the English Bills of Sale Acts. As to Ireland, Acts have been passed modelled on the English Acts. But Scotland has been excepted for a different reason, namely, that for Scotland such legislation would have been inappropriate. It is interesting by way of contrast to note how, under a system of ordinary law which gave effect to the reasonable presumption implied by possession, the elaborate statutory provisions of the English law became unnecessary.

By the law of Scotland, in order to transfer a right in the nature of property, whether absolutely or by way of security, over tangible moveable goods, it is essential, speaking generally, that the possession should be transferred. The kind of security known as *hypotheca* in the Roman law, was only admitted in Scotch law in the case of (a) feudal superior over goods of the vassal on the land; (b) landlord over goods of tenant on the land; and (c) maritime *hypothec* (or lien). Subject to these exceptions, the only recognised

mode by which the owner of such goods could convey them by way of security was by pledge. Moreover, in Scotland the law of reputed ownership exists independently of statute : and where it is constituted by the goods being left in the possession of one who is not the owner, under such circumstances as to give him the appearance of ownership, the active intervention of the owner, and not merely his withdrawal of consent, is necessary to put an end to the reputed ownership. Nor does it require bankruptcy to constitute a title through reputed ownership. The owner of moveable goods may, however, in one case, give a valid security over them without possession ; namely, if he is also the owner in fee of the ground of a mill or other works. Such an owner, by giving a bond and disposition in security of the ground, virtually gives the disponee a security over the plant and machinery upon the ground ; and if there is an express assignation of the moveables as well, it would be a good commercial security.

In concluding the rights in security over moveables, a brief mention must be made of the landlord's security over the goods, on the tenant's land, and the security commonly known in England as *maritime lien*. Both these are essentially rights in the nature of *hypotheca*, inasmuch as they are rights in security of a person not in possession, and that they are not regarded as property, but merely as rights modifying the right of property in the owner. Both are, in Scotland, comprised under the name of *hypothec*.

The landlord's security for rent, consisting in England of the right to distrain goods upon the premises for rent in arrear, is said to have been derived from the ancient feudal law ; and this view is corroborated by the circumstance that in Scotland the analogous right of "*hypotheca*" still applies to the feudal relation between superior and vassal, as well as to the relation between landlord and tenant.

The right to distrain at common law exists only where there is an actual demise at a fixed rent. But, under the Judicature Acts, a tenant in possession under an executory agreement, of which the Courts might order specific

performance, is in the same position with regard to distress as if he held under a lease made pursuant to the terms of the agreement.

By the common law, the goods distrained remained only as a security in the hands of the distrainor. But by the statute 2 Will. & M. sess. 1, c. 5, power was given to sell the goods after five days, now extendible, at the request of the tenant, to fifteen days, under the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, s. 5).

At common law rent cannot be distrained for after the determination of the tenancy, although the tenant holds over. But by 8 Ann. c. 14, s. 6, the rent in arrear may be distrained for provided (sect. 7) that the distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's interest and during the possession of the tenant. And (by 11 Geo. II. c. 19, s. 18) if the *tenant* has determined the lease by notice and yet holds over, he shall pay double rent for the time of holding over, and the double rent may be distrained for in the same way as the single rent, before the giving notice might have been distrained for.

When the rent is assigned, the assignee cannot recover rent which had become due before the date of the assignment; nor can an assignee of the reversion distrain for rent due by the tenant before the date of the conveyance.

By the common law, a landlord might employ anybody as his bailiff to distrain for rent. But by the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, s. 7), it is enacted that no person shall act as bailiff to levy a distress unless he is authorised to act as a bailiff by a certificate in writing under the hand of a County Court judge.

By the common law, the following classes of things were not distrainable:—

1. Things annexed to the freehold.
2. Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ.
3. Cocks or sheaves of corn.

And the following cannot be distrained, if there is sufficient distress besides :—

4. Beasts of the plough and instruments of husbandry.

5. The instruments of a man's trade or profession.

There are in modern times many other statutory exceptions, under various conditions. By the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), lodgers' goods are, under certain conditions, protected from distress by the superior landlord. By the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), rolling stock in a colliery, quarry, or other works, not belonging to the owner of the work, is protected from distress for rent due by the tenant to the landlord of the work. Gas and electric light fittings supplied by the undertakers under Acts incorporating the Gasworks Clauses Act, 1847, and the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56, s. 25), are similarly protected. By the 45th section of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), live stock taken in by a tenant by way of agistment at a fair price are protected from distress for rent due by the tenant to the land where there is other sufficient distress on the premises; and if distrained by reason of there being no other sufficient distress, the amount recovered by the distress is not to exceed the amount remaining due for the feeding. By the same Act, agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant, and stock of another which is on the premises of the tenant only for breeding purposes, are not to be distrained.

By the same Act, sect. 44, a distress cannot be made for rent which became due in respect of the holding more than a year before the making of the distress.

It should be observed that in all bailments there is a qualified right of property, sometimes described as a "special property," transferred from the bailor to the bailee, together with the possession. The tailor (to whom cloth is given to make up), the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainer, or other bailee, may each of them vindicate, in his own right, this possessory interest,

against any stranger or third person. For the bailee being responsible to the bailor, if the goods are lost or damaged by his wilful default or negligence, if he do not deliver up the chattels on lawful demand, it is reasonable that he should have a right of action against all other persons who have taken possession of or injured it, so that he may be always ready to answer the call of the bailor.

Maritime lien (so called) is a security in the nature of hypothecation, attaching without possession, over a ship. The security is constituted *ipso facto* (a) by damage from collision, where a ship navigated without fault is damaged by collision through negligent navigation of another ship; (b) by salvage; and (c) for wages due to the seamen employed in the ship. These are the only maritime liens recognised by the English Courts as arising from the general maritime law.

(a) In a case of actual collision between two ships, if one of them only is to blame, she is *ipso facto* subject to a maritime *lien* for the amount of damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. This principle was laid down as a rule of English law by the Judicial Committee of the Privy Council, affirming the judgment of Dr. Lushington in the case of *The Bold Buccleugh* (1850, 1851), 7 Moore P.C. 267; 24 R.C. 588; and was recognised and confirmed as belonging to the maritime law of Great Britain by the House of Lords in an appeal from Scotland in *Currie v. McKnight*, 1897, A.C. 97; 66 L.J.P.C. 19. To make the claim effective, an action *in rem* against the ship is taken in the Admiralty Court, in which a warrant may be issued for the arrest of the ship. But the arrest of the ship is not necessary to constitute the lien, which attaches at the moment of the collision.

(b) *Salvage*, or the reward given to those (other than the master and crew of the ship) by whose labour or assistance a ship or goods have been saved from shipwreck, fire, or capture, gives rise to a right in security constituted *ipso facto* on the property saved or recovered. Where the

property saved is a ship or cargo, the claim founds an action *in rem* in the Court of Admiralty, who determine, by their discretion, according to the circumstances, the amount of the reward. But the lien attaches, not by the proceedings in the Admiralty Court, but by the act of placing the goods in safety.

(c) The seamen employed in the ship, but not (except by statute, as hereinafter mentioned) the master, have a right in security (called a lien) upon the ship and freight for the wages due to them.

By the following statutory enactments, maritime lien has been extended to cases where it did not exist without such enactment.

By the Merchant Seamen Act, 1844 (7 & 8 Vict. c. 112, s. 6), the master was given, *in case of the bankruptcy of the owner*, all the rights, liens, and remedies of an ordinary seaman. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 191), this was re-enacted with the omission of the condition of bankruptcy. But the right to take proceedings in the Court of Admiralty was restricted, both as to seamen and master, to cases where the claim amounted to fifty pounds or more, or where the owner was bankrupt or the ship under arrest. By the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46, s. 1), the maritime lien of the master was extended to disbursements made and liabilities properly incurred by him on account of the ship. These provisions were incorporated in the Act now in force, the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which, so far as relates to maritime lien, are as follows:—

By sect. 164, a summary remedy is given to seamen for wages not exceeding £50.

Sections 165 and 167 are as follows:—

“165. A proceeding for the recovery of wages not exceeding fifty pounds shall not be instituted by or on behalf of any seaman or apprentice to the sea-service in any superior court of record in Her Majesty’s dominions, nor as an Admiralty proceeding in any Court having Admiralty jurisdiction in those dominions, except—

c.

Y

- “(i.) where the owner of the ship is adjudged bankrupt;
or
“(ii.) where the ship is under arrest or is sold by the
authority of any such Court as aforesaid; or
“(iii.) where a Court of summary jurisdiction, acting
under the authority of this Act, refers the claim
to any such Court; or
“(iv.) where neither the owner nor the master of the ship
is or resides within twenty miles of the place
where the seaman or apprentice is discharged or
put ashore.

“167.—(1) The master of a ship shall, as far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom.

“(2) The master of a ship, and every person lawfully acting as master of a ship, by reason of the decease or incapacity from illness of the master of the ship, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages.

“(3) If in any Admiralty proceedings in any Court having Admiralty jurisdiction touching the claim of a master in respect of wages, or of such disbursements, or liabilities as aforesaid, any right of set-off or counter-claim is set up, the Court may enter into and adjudicate upon all questions, and settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and may direct payment of any balance found to be due.”

CHAPTER XXXII.

OF PROPERTY HELD IN TRUST.

HITHERTO, for the most part, property has been considered as the right of the person having what English law regards as having the *legal*, as distinguished from a mere *equitable*,

title or estate. The distinction has already been briefly noted (p. 139, *et seq.*) to explain estates at common law under the Statute of Uses and estates in equity so far as relates to lands, tenements, and hereditaments. These terms "legal" and "equitable," as applied to estates or rights, imply, speaking generally, that the former class of rights were recognised by the Courts of common law as formerly constituted; the latter, in order to give them effect, required the aid of the Court of Chancery, exercising a (so-called) "equitable" jurisdiction. Although, as to jurisdiction, the functions of all these Courts are merged in the general jurisdiction of the Courts constituted under the Judicature Acts, and therefore the terms "legal" and "equitable," as implying jurisdiction, have become inappropriate, they still remain, by inveterate usage, as the well-understood term to mark an essential difference in the titles or estates referred to; the legal right or title being, speaking generally, that of the person having the paramount or complete proprietary title, the equitable right or title being that of the person beneficially entitled under a trust or beneficially interested under an executory instrument or agreement, requiring something more (such as the execution of a deed, or a judgment or decree of a Court having the effect of a vesting order) to give him the complete proprietary title. Under such an instrument the person having the legal title is, until the deed is executed and the conveyance completed, regarded in a Court of Equity as a trustee. The essential difference between a legal and an equitable title is, speaking generally, that the legal title confers a real right, that is to say, a right available against persons generally, although subject to any personal exception or claim arising out of the trust or executory instrument, and enforceable by the beneficiary against the person having the legal title; the equitable title is in the nature of a personal right, available only between the beneficiary and persons bound by the trust or executory instrument. Only, where the person having the equitable or beneficial interest is in possession, his

right has much of the character of a real right, since the fact of his possession is notice to all the world of his beneficial interest; and no person, by obtaining a conveyance of the legal title, could use it as against his beneficial right. The equitable owner in possession is thus secured, according to the rules of equity, against the legal owner, and any person deriving title from him; and he is secure against strangers, even according to the rules of common law, because the fact of his possession is *primâ facie* evidence of seisin in fee, and is good against all except the person who can show a title as rightful owner: *Asher v. Whitlock* (1865), L. R. 10 Q. B. 1; 35 L. J. Q. B. 17 (11 R. C. 541).

It is said by Blackstone that the notion of uses or trusts "was transplanted into England from the Civil Law, about the close of the reign of Edward III., by means of the foreign ecclesiastics, who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but *to the use* of the religious houses; which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his *prætor*, of compelling the execution of such trusts in the Court of Chancery." He observes that this purpose was crushed in its infancy by the statute 15 Rich. II. c. 5; but that the doctrine of uses was afterwards laudably applied to a number of civil purposes, and was much used in the time of civil wars by persons desirous of providing for their children by will, and of securing their estates from forfeitures.

In truth, the notion of property held on trust is essential to give effect to the varied requirements of a system of law adapted to an advanced society. For such purposes it is very convenient that owners of property should be allowed to commit the administration of it to those in whom they have confidence, so that the benefit may be enjoyed by various persons and in various ways, according to the intention of the trust instrument.

Besides the trust created by the express directions of a written instrument, there are trusts raised by implication of law: as, for instance, where the owner of land conveys it to A. upon such trusts as the grantor shall thereafter appoint; here, in the mean time, and until an appointment is made, A. holds as a trustee for the grantor. This is called a resulting trust. And where an agreement has been concluded for the sale of land, the vendor is considered in equity as a trustee for the purchaser. At one time, indeed, a trust might have been established upon merely parol evidence; but by the Statute of Frauds (29 Car. II. c. 3, s. 19) all trusts of lands, except such as arise by implication of law, must be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing.

Where a trust deed was framed (before the Settled Land Acts) with due regard to commercial dealing with the estate, the trustee would be armed with sufficient powers, generally with the consent of a beneficiary (tenant for life), to deal with the estate so as to give a good title to a purchaser. Where it became necessary, for public purposes, such as the making of a railway, to facilitate the sale of land, a power of sale was conferred by the enabling statute on trustees, as well as on tenants for life and other persons having legal estates in possession. The clauses framed for this purpose were embodied in the Land Clauses Act, 1845, which was incorporated in subsequent Acts, requiring land to be taken for public purposes. The Settled Land Acts, 1882 to 1890, were framed with the view of making land universally marketable; and the principle adopted was to confer upon the "tenant for life," *whether legal or equitable*, the power of sale, and to confer the same power upon various persons having estates or interests in possession who would not be ordinarily comprehended under the expression "tenant for life." These powers are made paramount to the estate of the trustees; but the purchase-money is secured for the trust purposes by being made payable to the persons who are, under the Settled Land Act, 1882, trustees of the

settlement for the purposes of the Act. These are the trustees, if any, who are appointed with power of sale under the settlement, or trustees who are, under the instrument of settlement, declared to be trustees thereof for the purposes of the Act, or trustees specially appointed by the Court for that purpose.

In regard to most kinds of personal property belonging to a trust estate, there is generally no difficulty in making a marketable title. Such property is usually placed in the names of the trustees by instruments of title which contain nothing to give notice of the trusts; and if, as is commonly the case, the trustees hold the usual documents of title, such as certificates of shares of a corporation, etc., there is nothing to prevent them selling and transferring the property to a purchaser, who takes it without anything to affect him with the trust.

NOTE AS TO DETERMINABLE OR CONDITIONAL FEES

(referred to at p. 127, *ante*).

The MS. note of Lord Hale, referred to on p. 127, *ante*, is printed in Mr. Butler's edition as follows:—

“King Henry the third *dedit manerium de Penreth et Sourby Alexandro regi Scotiæ et hæredibus suis regibus Scotiæ*; and Alexander having daughters, of which one was married to the Earl of Hunt., died, not having any heir king of Scotland; *et, eâ de causâ*, King E. I. recovered seisin, and the co-heirs of Alexander were excluded. Lib. Parl. E. 1. 134, 308.”

I am unable to find the record cited in this note; but the manors referred to must have been included in the gift which formed part of the transaction between Henry III. and Alexander II. of Scotland, dated A.D. 1237, and transcribed in Rymer's *Fœdera*, vol. i. p. 233, as follows:—

“... *Hen. R. Angliæ (i.e. H. III.) dedit et concessit dicto Alex. (i.e. Alexander II.) R. Scotiæ ducentas libratas terræ infra dictos comitatus North² et Cumberl² si præd. ducentæ libratae terræ in ipsis comitatibus extra villas ubi castra sita sunt, possint inveniri . . . Habendas, tenendas et in dominio retinendas eidem Alex^r Regi Scotiæ et hæredibus suis Regibus Scotiæ de dicto Henrico Regi Angliæ et hæredibus suis: Reddendo, etc.*”

Alexandra II. died in 1249, and was succeeded by his son Alexander III., whose daughter Margaret, Queen of Norway, died in 1283, leaving a newly born daughter, commonly referred to in history as “the Maid of

Norway." A few months later the only son and heir-apparent of "K. Alexander III. died; and the Scotch barons, convened at Scone to consider the question of the succession, passed an Act reciting that Alexander III., since the death of his son, was without immediate legitimate issue, and declaring his grand-daughter (the Maid of Norway) heir-presumptive to the Crown" (Thomson's Acts of the Parliament of Scotland, vol. i. p. 82).

Accordingly, on the death (in 1286) of Alexander III., the Maid of Norway succeeded as Queen of Scotland, acknowledged by the Barons of Scotland as well as by King Edward himself, who entertained the project of a marriage between the young Queen and his own son Edward.

On the untimely death, in September, 1290, of the Maid of Norway (in Orkney, on the way over to Scotland), there was a failure of issue as well of Alexander III. as of his father Alexander II.; and to find an heir, whether to the Crown or to any lands vested in either of the Alexanders, it became necessary to go back to the issue of David I., the great-grandfather of Alexander II., and to trace the descent through the *three daughters of his grandson* DAVID, EARL OF HUNTINGDON, who was a brother of William (called William the Lyon) and uncle of Alexander II.

Notwithstanding his confusion as to the facts, Lord Hale may have correctly inferred the ground on which King Edward I. recovered seisin; namely, that the co-heirs of Alexander, who, as such, would have inherited his lands, did not come within the form of the gift to "heirs kings of Scotland."

I should rather infer that, after the death of the Maid of Norway, the seisin was resumed by King Edward on the ground that the succession to the Scotch Crown was in abeyance. At all events, at this time the seisin of King Edward was temporary, as appears from the proceedings which took place after the award of the Scotch Crown made by King Edward in favour of John de Balliol.

On the petition of "John [Balliol] King of Scotland," the manors were given up to the petitioner, who became seised, of course upon doing homage (A.D. 1293, Rot. Parl., vol. i. p. 114).

At a later date, after the manors had been seised into the hands of King Edward on Balliol's forfeiture, and given to the Bishop of Durham, a claim was made to the estate by Sir John de Hastings, who had been one of the claimants to the Crown, through the youngest daughter of David, Earl of Huntingdon. He now claimed a third of the manors in right of his heirship to K. Alexander. But his petition was summarily dismissed, on the ground that, not being King of Scotland, he did not come within the form of the gift (A.D. 1306, Rot. Parl., vol. i. p. 206a).

R. C.

PART III.—*OBLIGATIONS*.

CHAPTER XXXIII.

OBLIGATION—ARRANGEMENT OF SUBJECT, AND GENERAL PRINCIPLES APPLICABLE TO CONTRACT.

“*OBLIGATIO est juris vinculum, quo necessitate astringimur alicujus solvendæ rei secundum nostræ civitatis jura.*”—Inst. 3. 13.

The fiction of constraint, as if by a physical chain or bond, is the ground notion of an obligation by law.

“Obligation” in the strict sense, as distinguished from the duties implied by property, comprises those legal relations by which a particular person, or some particular persons, are specially bound, as distinguished from those (such as the duty not to trespass on my land) which are binding on everybody alike.

Obligations, to which civil liability attaches, arise (A) *Ex contractu* (by contract) or *quasi ex contractu* (through a legal relation analogous to contract); or (B) *Ex delicto*, that is to say, by an injury, otherwise than by reason of contract.

(A) *OBLIGATIONS BY CONTRACT.*

SOME GENERAL PRINCIPLES.

Obligation by contract is constituted by a promise made by a person or persons on the one part, in consideration of an act, forbearance, or promise by another person or persons on the other part. Where there are mutual promises, by two persons or groups of persons, each party is bound by the contract.

To the validity of an obligation by contract it is essential (1) that the person binding himself is legally capable of contracting; and (2) that the contract is a lawful one.

(1) As to legal capacity, the following persons are, speaking generally, incapable of binding themselves by contract, namely: (a) *Alien enemies*; (b) *Convicts*; (c) *Infants*; (d) *Lunatics*; and (e),—according to the law in force before 1882, but now with the exception of large capacities introduced by the Married Women's Property Acts, 1882 and 1893 (a),—*Married women*.

(a) *Alien enemies*, who are persons subject to a sovereign actually at war with the sovereign of this country, are, on grounds of public policy, deemed incapable of contracting with British subjects, and *vice versâ*.

(b) *Convicts*.—A convict is defined by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), sect. 6, as a person against whom, after the passing of the Act, judgment of death, or of penal servitude, shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony. By sect. 7, the condition, in effect, ceases, upon the death of the convict, or upon his having undergone his term of punishment, or having received His Majesty's pardon. By sect. 8 of the same Act, the convict is incapable of making any contract, save as in the Act provided. By sect. 30 of the same Act, the disability is suspended as to any convict during the time when he shall be lawfully at large. During the operation of the Act, provision is made for the powers of the convict being vested in an administrator.

(c) *Infants*.—The general rule, at common law, is that a contract with an infant (under twenty-one years of age) is voidable; that is to say, it is in the option of the infant to make void the contract, and have matters restored to their original position, if that is substantially practicable.

Now, by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), ss. 1 and 2, all contracts with infants for goods supplied or to be supplied (other than contracts for

(a) 45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63.

necessaries) are absolutely void, and incapable of being ratified. To rebut a plea that goods are necessaries, it is enough to show that the infant was already sufficiently provided with goods of the kind; and it is immaterial whether the tradesman had notice of this or not: *Barnes v. Toye* (1884), 13 Q. B. D. 410; *Johnstone v. Marks* (1887), 19 Q. B. D. 509. Notwithstanding the Infants Relief Act, it has been held that where an infant has bought and paid for furniture contained in a house occupied by him, he cannot recover the money paid as on a void contract: *Valentini v. Canali* (1889), 24 Q. B. D. 166. An infant who is a husband and father is under the same obligation, as if he were of full age, to supply his wife and children with necessaries; and therefore a contract by him for supplying such necessaries is valid.

Contracts by an infant which are not within the Infants Relief Act, 1874, are still voidable at common law. Contracts by which a permanent liability is intended, must, in order to be avoided, be repudiated within a reasonable time after attaining majority. Such are marriage settlements, partnerships, contracts to take shares in companies, upon which the infant has been registered as a shareholder.

By the Infants Marriage Settlement Act, 1855 (18 & 19 Vict. c. 43), infants may, with the sanction of the Court, make valid settlements on marriage. But where a marriage settlement has been made by an infant without the sanction of the Court, it is still only voidable, and, if not repudiated within a reasonable time after attaining majority, is binding: *Carter v. Silber* (1892), 2 Ch. 278; 61 L. J. Ch. 401; *Edwards v. Carter* (1893), A. C. 360; 63 L. J. Ch. 100.

Other contracts, such as contracts to perform a single act, required ratification in order to be binding. And, by Lord Tenterden's Act (9 Geo. IV. c. 14), such ratification, to be binding, must be in writing. And now, by sect. 2 of the Infants Relief Act, 1874, the ratification (unless there is a new contract) will not make the original promise binding: *Coxhead v. Mullis* (1878), 3 C. P. D. 439; *Northcote v. Doughty* (1879), 4 C. P. D. 385; *Ditcham v. Worrall* (1880), 5 C. P. D. 410; 49 L. J. C. P. 688.

By the Infants Loan and Betting Act, 1892 (55 & 56 Vict. c. 4), s. 5, all agreements and instruments (although negotiable) made for the payment of money advanced during infancy are absolutely void.

(d) *Lunatics*.—The contract of a lunatic is, like that of an infant at common law, generally voidable. There is, however, no hard-and-fast rule by which the nature and degree of the unsoundness of mind to avoid a contract can be fixed. The question is whether there was such an insane delusion as to enter into the subject-matter so that the person is incompetent to manage his affairs in respect of the matter in question: *Jenkins v. Morris* (C. A. 1880), 14 Ch. D. 674. Where the lunatic has fully enjoyed the benefit stipulated for, and matters cannot be restored to their original position, and no advantage appears to have been taken, there is no case for redress. Such was the case of *Molton v. Camroux* (1848), 2 Ex. 487 (Ex. Ch. 1849), 4 Ex. 17; 17 L. J. Ex. 68; 18 L. J. Ex. 356, where a lunatic had purchased an annuity, and fully enjoyed the benefit during his life.

(e) *Married women*.—At common law a married woman could not bind herself by contract. The creation, however, of a separate estate by the Court of Chancery, that is to say, what is called her separate estate in “equity,” was necessarily accompanied by a contractual capacity, *sub modo*. This was limited, in effect, to binding her separate estate if she contracted with that intention, and could only bind her separate estate as to which she was not, at the date of the contract, restrained from anticipation: *Pike v. Fitzgibbon* (C. A. 1881), 17 Ch. D. 454. This contractual capacity was extended by the Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75), and the Married Women’s Property Act, 1893 (56 & 57 Vict. c. 63), the effect of which is summarised in the former part relating to the *status* of a married woman (p. 74, *et seq.*). Briefly the result is, (i.) that the property of a married woman is generally regarded as separate estate, (ii.) that in making a contract the intention to bind her separate estate is presumed, and (iii.) that the contract

is effectual to bind all her separate estate, whether afterwards acquired or not; provided that property in the hands of trustees, as to which she is restrained from anticipation, cannot generally be made available in execution to satisfy a contract made at or before the time when the restraint exists.

(2) As to illegality, the general principle is that the contract cannot confer a title to sue upon it, where either the thing promised or the consideration is prohibited by law, or is against public policy or good morals. If any part of the consideration for a promise is illegal, the promise is wholly void of legal effect: *Lound v. Grimwade* (1888), 39 Ch. D. 605. Where several promises are made upon the same consideration, if one of the promises is lawful, and others unlawful, the lawful promise may have effect provided it is separable from and not dependent on any unlawful promise: *Baker v. Hedgcock* (1888), 39 Ch. D. 520.

For instance, the sale of a public office, where the nomination to the office is in private hands, is illegal, both at common law and under the statutes (Sale of Offices Acts, 1551 and 1809; see p. 514, *post*). So, in the time of the monopoly of the East India trade, the agreement by the owner of the ship, for a money consideration, to recommend the appointment of a certain person to the post of commander—the appointment to which rested with the East India Company on the recommendation of the owners—was held illegal: *Blachford v. Preston* (1799), 8 T. R. 89 (4 R. R. 598). In *Card v. Hope* (1824), 2 B. & C. 661 (26 R. R. 503), the same principle was applied to the sale of shares in an East Indiaman, with a stipulation that a certain person should be appointed to the command; and an opinion was strongly expressed that the principle would apply to any ship. The principle has been somewhat relaxed in agreements for partnership between solicitors in the country who agree to share the emoluments of the public offices held by them: *Sterry v. Clifton* (1850), 9 C. B. 110; and in *bonâ fide* agreements for a sale of the *goodwill* of a professional business: *Bunn v. Guy* (1803), 4 East, 190 (7 R. R. 560); *Candler v. Candler* (1821), Jacob. 225.

Since trading with an alien enemy without the King's licence is illegal, it has been held that a contract for insurance on the voyage to this country of goods so purchased is likewise illegal: *Potts v. Bell* (1800), 8 T. R. 548 (13 R. C. 547). But when a certain trade with the enemy is carried on with the King's licence, the trade is legalised for all purposes; and an insurance of the goods by the shipper, either in his own name or as an agent for the consignee, who is an alien enemy, is lawful: *Uparischa v. Noble* (1866), 13 East, 332 (13 R. C. 563).

It is unlawful for a British subject to insure, against the effect of capture by his own government, the property of the enemy. And although the insurance is made previously to the commencement of hostilities, the contract cannot be enforced in case of such capture: *Furtado v. Rogers* (1802), 3 Bos. & P. 191 (14 R. C. 125). But there is nothing to prevent a person insuring against the consequences of an act of his own government (such as an embargo) where there is peace between the countries of the assured and the insurer, and the purpose of the act is unconnected with hostile purposes. The insured is not, in such a case, to be identified with the acts of his own government: *Aubert v. Gray* (Ex. Ch. 1862), 3 B. & S. 163 (14 R. C. 139).

A contract in restraint of trade generally is bad as being contrary to general utility. But the principle does not extend to contracts for a partial restraint, such as are usually made in the sale of the goodwill of a business. Under such an agreement a covenant not to carry on a particular trade within certain limits is lawful; and the area of restraint may be indefinitely extended where the restriction is reasonable, having regard to the subject-matter of the contract: *Nordenfelt v. Maxim-Nordenfelt Guns, etc., Co.* (1894), A. C. 535; 63 L. J. Ch. 908.

Another source of illegality is *maintenance*, where a person, who has no interest in the subject-matter of an action or trial, agrees to pay the costs of it. The illegality is aggravated where the person so maintaining the suit stipulates for a participation in the profits. This is called

champerty, which is said to be the most odious kind of *maintenance*. The principle is illustrated by the cases of *Hutley v. Hutley* (1873), L. R. 8 Q. B. 112, and *Guy v. Churchill* (1888), 40 Ch. D. 481. It is not *champerty*, nor is it unlawful, for an attorney to take (*pendente lite*) an assignment by way of security for his costs: *Anderson v. Radcliffe* (1858), E. B. & E. 806; but an out-an-out purchase by the attorney of the subject-matter is illegal: *Simpson v. Lamb* (1857), 7 E. & B. 34.

An agreement that the property of A. is to become, on his bankruptcy, vested in B. is illegal, as contrary to the spirit of the bankruptcy laws, by which the property of A. becomes, on his bankruptcy, divisible amongst his creditors: *Ex parte Mackay* (1873), L. R. 8 Ch. 643. So is a release by a creditor of the bankrupt on a secret agreement that the creditor is to have more than his proportion in the distribution of the estate. In such a case, as against the creditor, the release is good and the agreement bad; so that he loses both his debt and his share in the composition: *Ex parte Phillips, In re Harvey* (C. A. 1888), 36 W. R. 567.

Every agreement having a tendency to affect the administration of justice is void: *per* Lord LYNTHURST in *Egerton v. Earl Brownlow* (1869), 4 H. L. C. 163. And especially an agreement for stifling a criminal prosecution is bad: *Lound v. Grimwade* (1888), 39 Ch. D. 605; *Williams v. Bayley* (1866), L. R. 1 H. L. 200. The principle is that where the matter of an indictment is of public concern, it is not a subject for compromise: *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351.

Where money has been paid under an illegal agreement, the person who has paid the consideration may, before the illegal purpose has been carried out, repudiate the agreement and claim repayment: *Diggle v. Higgs* (1877), 2 Ex. D. 422; *Taylor v. Bowers* (1876), 1 Q. B. D. 291. But if the illegal purpose has, though only partially, been carried out, the consideration is irrevocable: *Kearley v. Thomson* (1890), 24 Q. B. D. 742; see also *Barclay v. Pearson* (1893), 2 Ch. 154; 62 L. J. Ch. 636.

Illegality by statute.—Where a contract is expressly prohibited by statute, a contract falling within the description is, of course, illegal; and it is idle to speculate on the reason of the legislature for enacting the prohibition. But where the prohibition arises by implication, certain presumptions have been established. If a penalty is imposed once for all upon a certain course of dealing, merely with the object of convenience in collecting the revenue, there is no inference of an intention to prohibit any particular contract which may be made in the course of such dealing; but if the penalty is imposed for the direct benefit of the general public—as, for instance, for the prevention of fraud—or if it is imposed in the way of a recurring penalty for each dealing, then a contract under which the penalty is incurred is void. Compare *Brown v. Duncan* (1829), 10 B. & C. 93, and *Cope v. Rowlands* (1836), 2 M. & W. 149 (46 R. R. 532); *Young v. Corporation of Leamington* (1883), 8 App. Cas. 517.

By the common law of England, in this respect differing from the law of Scotland (*a*) and some other countries, there is nothing to prevent the enforcement by law of a bargain entered into by way of a wager. And the Gaming Act, 1845 (8 & 9 Vict. c. 109), by which contracts by way of gaming or wagering (sect. 18) were made null and void, did not make them illegal; so that a contract indirectly arising out of a wager might be sued upon. But by the Gaming Act, 1892 (55 & 56 Vict. c. 9), “any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise, in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sums of money.”

While agreements by way of wagering are not made unlawful, the case is different as to gaming and betting

(*a*) *Bruce v. Ross*, H. L., April 14, 1788.

under certain conditions under the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38, s. 4); the Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38, s. 3); and the Betting Acts, 1853 and 1874 (16 & 17 Vict. c. 119, and 37 & 38 Vict. c. 15), where such practices are expressly prohibited. The cases under the Betting Acts have given rise to some fine distinctions.

The statute against lotteries, the Gaming Act, 1802 (42 Geo. III. c. 119, s. 2), is illustrated by the case of *Taylor v. Smetten* (1883), 11 Q. B. D. 207, where a claim of a prize in a lottery was offered as an additional inducement for the purchase of a pound of tea at a price stated to be the value of the tea, and the vendor was convicted under the statute.

VARIOUS CLASSES OF CONTRACTS.

Contracts have already been considered in their bearing on the constitution of property (a). In so considering them it has been inevitable to anticipate some statement of their effect in constituting an obligation. It is from this point of view that the more important kinds of contracts will now be classified. They will now be considered, so far as relates to the obligations incurred, in the following order:—

(1) Gratuitous bailments constituted by delivery of a moveable chattel—

(a) Loan.

(b) Deposit.

(2) Debt constituted—

(a) By bond or covenant.

(b) By account stated.

(3) Contracts by written instruments operating “according to the custom of merchants”—

(a) Bills of exchange.

(b) Promissory notes.

(4) Consensual contracts. These may be classed, having regard to their subject-matter, as follows:—

(a) Sale, including (first) contracts for the sale of

(a) See p. 246, *et seq.*

land, and (secondly) contracts for the sale of goods.

- (b) Bailments for reward, including—
 - (i) Pledge (so far as relates to the obligations *inter se* of the parties to the transaction).
 - (ii) Contracts for carriage of goods under charterparty, bill of lading, or otherwise.
 - (iii) Warehousing contracts.
 - (iv) Contracts of hire, and other bailments not included in the foregoing classes.
 - (c) Insurance.
 - (d) Agency, and other confidential relations (including duties and liabilities of trustees).
 - (e) Partnership.
 - (f) Innominate contracts (promise and consideration generally).
-

CHAPTER XXXIV.

GRATUITOUS BAILMENTS.

HAVING regard to the above arrangement of contracts, I now consider—

(1) Gratuitous bailments, constituted by delivery of a chattel.

(a) Loan.

(b) Deposit.

(a) As to loan (*commodatum*) of a chattel, little has to be said, except that, as the benefit is, presumably, entirely that of the borrower, he is expected to bestow a high degree of care in the keeping of the chattel. In effect, he is held to warrant the safe-keeping, except from such accidents as are attributed; in English law, to the “act of God.” In the Roman law he is said to be responsible for everything except *casus* (D. xiii. 6. 18; Inst. iii. 14). On the other hand, the lender of the thing which proves dangerous to the user is only liable if he knew of the fault which made

it dangerous, and has resulted in damage to the user (D. xiii. 6. 18, s. 3; *Blakemore v. Bristol & Exeter Ry. Co.* (1857), 8 E. & B. 1035).

(b) In a case of gratuitous deposit for safe-keeping, it was considered by the Roman lawyers that the bailee was only liable for intentional wrong (*dolus*), or for that gross negligence (*culpa lata*) which the law refused to distinguish from intention. The principle applied by English law is that a person receiving property by way of deposit for safe-keeping is not responsible for any higher degree of care than a reasonable and prudent man may be expected to take of property of the like description; and, by the decision of the Judicial Committee, in the case of *Giblin v. McMullen* (1869), L. R. 2 P. C. 318; 38 L. J. P. C. 25 (3 R. C. 613), bankers who received securities for deposit for safe custody gratuitously—not making any charge for commission or having any lien on the securities—were exonerated from a loss through theft by the cashier of the bank, on showing that the securities were kept in a strong room of the bank, and in the same way that their other securities were kept.

CHAPTER XXXV.

DEBT.

THE next species of contract under the above arrangement (p. 336, *supra*) is—

(2) Debt

(a) By bond or covenant.

(b) On account stated.

(a) *Debt by bond or covenant.*—On this class of obligations, it is sufficient to say that the absence of express consideration is supplied; or, in other words, consideration is presumed by the seal of the party bound in the obligation.

It may, indeed, be possible, on the principles enunciated in *Thoroughgood's Case* (2 Co. Rep. 9a), for a party to avoid

what is apparently his bond, on the ground that he executed it under an essential mistake as to the nature of the instrument; *e.g.* if an illiterate person had sealed a bond on the representation by the other party that the purport was essentially different from that contained in it. But the burden of proof in such a case is extremely great against the person setting up such a defence, and is tantamount to the proof of fraud in the party relying upon the instrument.

Formerly, debts on bond or covenant, under the name of specialty debts, enjoyed a priority in the administration of an insolvent estate over debts by simple contract. But this priority was abolished (in 1869) by the statute 32 & 33 Vict. c. 46 (commonly called *Hinde Palmer's Act*, and now, under the Short Titles Act, 1896, "*The Administration of Estates Act, 1869*").

Debts of record have been already referred to (*a*) as constituting another class of debts. And in one sense they do constitute a class by themselves; for, when judgment is pronounced establishing a debt, there is a *novation* of the original obligation — *transit in rem judicatam*. But, as a judgment, speaking generally, proceeds upon an obligation already existing, its effect belongs rather to procedure than to substantive law.

(*b*) *Debt on account stated* is generally constituted by the admission of the party charged. The strongest evidence is the admission in writing, signed by the debtor, of the amount due. The statement of the amount, preceded by the letters "I.O.U." ("I owe you"), in a writing signed by the debtor, and delivered by him to the creditor, is commonly received as evidence of a debt on account stated (*b*). An implied admission by acquiescence in a state of account delivered by the creditor, is also evidence, though, of course, not so strong as an admission in writing under the hand of the debtor.

(*a*) At p. 263

(*b*) P. 267.

CHAPTER XXXVI.

BILLS OF EXCHANGE, ETC.

THE next class of contracts to be considered are—

(3) Contracts by written instruments operating “according to the custom of merchants.”

(a) Bills of exchange.

(b) Promissory notes.

The law relating to both these classes of instruments is now consolidated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 16). Having regard to the circumstance that instruments of this class are, by the custom of merchants, negotiable so as to pass from hand to hand as property, and to create obligations between persons who are in no way related by way of contract to each other, it has been found convenient to deal with the whole subject under the head of “property” (pp. 264–266, *supra*). And it is, therefore, unnecessary here to repeat so much as would, perhaps, be strictly applicable to those instruments regarded as contracts.

CHAPTER XXXVII.

CONTRACTS PERFECTED BY CONSENT (GENERALLY).

THE next class of contracts under the arrangement, p. 336, *supra*, are—

(4) Consensual contracts.

As to this large class of contracts (subject only to the requirements of the Statute of Frauds where that statute applies), the contract is completed by the interchange of consent. Where both parties are face to face, or where they concur in signing a single written instrument, there is little room for any question as to the fact of consent. But where the parties are at a distance so that the transaction resolves itself into an offer on the one side, and, at a greater or less interval of time, acceptance on the other, there are some points which require consideration.

Where an offer is sent by letter, the offer is presumed to

continue during such period as is determined by the terms of the offer, or until the lapse of a reasonable time for acceptance ; or, until notice of a revocation of the offer has *reached* the person to whom the offer is made : *Adams v. Lindsell* (1818), 1 B. & Ald. 681 ; *Stevenson v. McLean* (1880), 5 Q. B. D. 346 (6 R. C. 80). The only difference in sending the offer by telegram is that the time which is considered reasonable for acceptance is presumably shortened. Where an offer contained in a letter is accepted by letter, the posting of the letter of acceptance, while the offer still continues, is an act conclusively effecting a binding contract : *Dunlop v. Higgins* (1852), 1 H. L. C. 381 ; *Household Fire Insur. Co. v. Grant* (1879), 4 Ex. D. 216 ; 48 L. J. Ex. 577. Where the offer is refused by the person to whom it is made, there is an end of it, and any subsequent communication purporting to accept can only be regarded as a new offer on the other side : *Hyde v. Wrench* (1840), 3 Beav. 334 (6 R. C. 139).

Where a contract is alleged to have been made by letters between parties between whom verbal negotiations have also passed, the whole of the correspondence and negotiations between the parties may be looked at in order to see whether the parties have come to terms ; and if it appears that there were essential terms contemplated which were not agreed to, there is no contract : *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311 (6 R. C. 155). The mere fact that the parties, who have agreed in a binding manner to the essential terms, have intended to embody them in a more formal contract, does not prevent the agreement being binding ; but if it appears that the drawing up of a formal contract was intended as a condition precedent to the transaction by which the parties were to be bound, there is no contract until this is done : *Winn v. Bull* (1877), 7 Ch. D. 29 ; *Rossiter v. Miller* (1878), 3 App. Cas. 1124 (6 R. C. 170).

Where, after parties have apparently agreed to the terms of a written contract, circumstances disclose a latent ambiguity in the meaning of a word, by which one of the parties meant one thing, and the other a different thing, the word being fairly capable of either meaning, and the

difference going to the essence of the supposed contract, the result is that there is no contract: *Raffles v. Wichelhaus* (1864), 8 Hurl. & Colt. 906 (6 R. C. 198).

Where a person is induced to sign what purports to be a contract through a fraud going to the essence of the consent, there is no contract to bind him. And so if A. has been fraudulently induced to make what purports to be a contract with B., under the belief, induced by B., that he is contracting with C., there is no valid contract: *Cundy v. Lindsay* (H. L. 1878), 3 App. Cas. 459; 49 L. J. Q. B. 481.

Where there is a mere mistake on the one side, of a term essential to the contract, there is room for some fine distinctions. If there is nothing to show that there was any reasonable ground for the mistake, the contract may be enforced according to its terms. But there are some cases of mistake without fraud, where the Court has allowed the party who has not unreasonably mistaken the purport of the apparent transaction to say there was no contract. The following are cases: *Thoroughgood's Case* (1582), 2 Co. Rep. 9a, 9b; *Couturier v. Hastie* (1856), 5 H. L. Cas. 673. The cases which have gone furthest in this direction are those which belong to the jurisdiction formerly exercised by the Court of Chancery, and still considered to be the "equitable" jurisdiction of the Court. Under this jurisdiction, the Court enforces specific performance of a contract for the purchase of land, which does not, like a contract for sale of specific goods, execute itself, so as to give a complete (or what is called a "legal") title. The principle upon which the Court of Chancery proceeded in a case of mistake has been expressed thus: "If it appears upon the evidence that there was, in the description of the property, a matter in which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this Court cannot enforce the specific performance against him." *Per Lord ROMILLY*, in *Swaishand v. Dearsley* (1861), 29 Beav. 430 (at p. 433). In a case of this kind the Court orders rescission of the contract, with an option to the defendant to accept

rectification according to the sense in which the contract is admitted to have been made by the plaintiff. See *Preston v. Luck* (1884), 27 Ch. D. 497; *Pagett v. Marshall* (1885), 28 Ch. D. 255; 54 L. J. Ch. 575; *Olley v. Fisher* (1886), 34 Ch. D. 367; 56 L. J. Ch. 208. And see 6 R. C. 202, and notes, p. 223, *et seq.*

The effect of mere consent, as applied to some of the contracts conveniently included in the class of consensual contracts, is controlled in England by the enactments of the statute commonly known as the Statute of Frauds (29 Car. II., c. 27). The section of this statute relating to the sale of goods, now formally repealed and substantially re-enacted in the Sale of Goods Act, 1893, has been already set forth (p. 250, *supra*) in its connection with the subject of title to goods. This enactment it is unnecessary to repeat here, only observing that it relates as well to the obligations under a contract for the sale of goods as to the title to the property in the goods. There is another section relating to leases and interests (at law or in equity) of land, which has already been referred to in relation to estates in land (at p. 199, *supra*).

The fourth section of the Statute of Frauds (29 Car. II., c. 3) enacts as follows: That after the date mentioned (June 20, 1676) (1) "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement which is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The memorandum, in writing, required by this section must give the name or description sufficiently to identify the parties, and must show the consideration, the whole of the promise, and any other essential terms agreed upon, as well as the fact of the agreement, and must contain the signature of the party to be charged, or of his duly authorised agent: *Wain v. Warlters* (1804), 5 East, 10; *Laythoarp v. Bryant* (1836), 2 Bing. N. C. 735 (6 R. C. 230, *et seq.*).

Where the agreement is contained in more than one document, they cannot be connected by merely parol evidence, so as to constitute a memorandum within the statute. But two papers may, by intrinsic evidence, with the aid of parol evidence of surrounding circumstances, be so connected as to constitute a memorandum: *Boydell v. Drummond* (1809), 11 East, 142; *Ridgway v. Wharton* (1858), 6 H. L. Cas. 238; *Allan v. Bennett* (1810), 3 Taunt, 169; *Studd v. Watson* (1884), 28 Ch. D. 305; *Oliver v. Hunting* (1890), 44 Ch. D. 205.

A "penalty," strictly so called, may be modified by equitable consideration. But it depends on the intention of the contract as inferred from the subject-matter, whether the expression "penalty" is to be construed as a penalty in the strict sense, or as a stipulation for liquidated damages. *Clydesdale Engineering Co. v. Don Jose, etc.*, 1905, A. C. 6.

Consensual contracts will now be considered under the various heads already enumerated.

CHAPTER XXXVIII.

SALE AS A CONTRACT.

REFERRING to the division of contracts on p. 336, *supra*, there is now to be considered—

(a) The contract of sale.

And first, reverting to the effects of a sale, as to lands, tenements, and hereditaments, it will be remembered that,

for such a contract to be enforceable, it must satisfy the Statute of Frauds (see p. 343, *ante*). Where there is a contract for sale of land which has not been carried out by a conveyance of the legal estate, there is, of course, no transfer of the paramount property, although the buyer has the equitable estate or title (as explained on p. 142), subject to the conditions of the contract. As constituting an obligation, the contract has effect, according to the system formerly called "equity," in a suit, now called an "action, for specific performance." The same principles apply to a contract not carried out by an appropriate conveyance for the sale of something which is not land, and does not fall within the category of goods as defined in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). Only in regard to such contracts (*e.g.* the usual contracts made upon the Stock Exchange) the Statute of Frauds has no application.

Secondly, as to contracts for the sale of goods as defined by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). The effect of the principal section of this Act, relating to the transfer of property, has been already stated. As to the risk, it is presumed, unless otherwise agreed, that the risk remains or goes with the property; but if either seller or buyer is *in morâ*, he takes upon himself any risk which is occasioned by the delay (56 & 57 Vict. c. 71, s. 20). The principal obligations which arise out of a contract for the sale of goods are as follows:—

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract (56 & 57 Vict. c. 71, s. 27).

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the possession of the goods (sect. 28).

Unless otherwise agreed, the place of delivery is presumed to be the seller's place of business, if he has one, and if not his residence. Provided that if the sale is of specific goods,

which, in the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery (sect. 29 (1)).

Where by the contract the seller is to send the goods to the buyer, and no time is specified, the seller is bound to send them within a reasonable time (sect. 29 (2)).

If the seller deliver a wrong quantity, or including goods of a wrong description, the buyer may reject or accept the whole, or the part tendered in accordance with the contract, paying for them at the contract rate (sect. 30).

Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them until he has had a fair opportunity of ascertaining whether they are in conformity with the contract (sect. 34).

Where the buyer does any act with relation to goods delivered, which is inconsistent with the ownership of the seller, or where he retains them for a time, which would be unreasonable if he intends to reject them, he is deemed to have accepted them (sect. 35).

Where the buyer has the right to refuse the goods tendered, it is sufficient that he intimates his refusal to the seller; and he is not bound to send them back (sect. 36).

On breach of contract by the seller, by non-delivery, the buyer may bring an action for damages; and the measure of damages is the estimated loss directly and naturally resulting from the breach (sect. 51).

Generally there is no implied warranty by the seller that the goods are fit for a particular purpose; but if the seller has notice of the purpose, and that the buyer relies upon his skill or judgment as to the goods answering such purpose, there is an implied condition that the goods are fit for that purpose. And where goods are bought by description from a seller who deals in that class of goods, there is an implied condition that the goods are of merchantable quality (sect. 14). As to certain classes of goods, there is a warranty or condition implied by statute: see the Fertilisers and Feeding Stuffs Act, 1906 (5 Ed. VII. c. 27).

CHAPTER XXXIX.

BAILMENTS FOR REWARD.

REVERTING to the arrangement, p. 337, *supra*, the next kind of contract is—

(b) Bailments for reward.

Following the subdivision on the same page, there is—

(i.) Pledge (so far as relates to the obligations *inter se* of the parties).

A simple pledge is constituted where the owner in possession of goods delivers them to another in consideration of an advance of money, and on the terms that on repayment of the money with any stipulated interest, the goods are to be redelivered to the owner. The effect is to create a qualified property in the pledgee, leaving the property, subject to that qualification, in the owner. The effect, so far as relates to the property, is already dealt with (at p. 298, *et seq.*). The primary obligations arising out of the transaction are, upon the pledgor, to pay the money with the interest at the time stipulated, and upon the pledgee, upon due payment to redeliver the goods, and in the meantime to use ordinary care in the keeping of them. It may be observed that a pledge, in the strict sense of the word, is distinguishable from the security created by a bill of sale of "personal chattels" which remain in the possession, or apparent possession, of the grantor of the bill. These, and the Acts relating to them, are fully considered in the chapter on Rights in Security over Moveables (p. 297, *et seq.*). It has already been observed (p. 254) that the contracts of pawnbrokers have been regulated by statute (35 & 36 Vict. c. 93). This Act applies to loans by a pawnbroker of 40 shillings and under, and, with certain exceptions, to all loans by a pawnbroker of £10 and under (sect. 10). He is to keep books, etc., as prescribed by the Act; and to exhibit in his shop in a conspicuous manner, his name with the description "pawnbroker," and information as to the prescribed conditions on

which he conducts business (sect. 13). On sale of a pledge made for over 10 shillings, he may be called upon by the pawnee to pay the surplus appearing by his books over the amount due on the pawnticket (sect. 22). In regard to property on which the pawnbroker has lent a sum of above 40 shillings, he may make a special contract, which, so far as the terms exclude the provisions of the Act, shall have effect accordingly. Subject to the provisions of the Act, the pawnbroker is bound, on payment of the loan and authorised profit, to deliver the pledge to the person producing the pawnticket, and he is indemnified for so doing (sect. 25).

(ii.) Contracts for the carriage of goods.

Such a contract may be by charterparty, bill of lading, or otherwise.

In relation to the carriage of goods by sea, the contracts usually employed take the form of a charterparty or a bill of lading. Both these forms of contract may apply to the carriage of the same goods; and where that is the case, the charterparty is presumably the ruling instrument to determine the obligation as between the parties to it.

Charterparty is a contract between the owner of a ship and the freighter, by which the owner engages to let to the freighter the use of the ship and furniture, or of some part of the storage room in the ship, for a certain term or for a prescribed voyage; and the freighter engages to pay for the hire according to the terms arranged. The contract may embody various stipulations as to the appointment, payment and power of dismissal of the master, or of the engineers, crew and servants of the ship or any of them, and as to the adjustment *inter se* of the liabilities and risks.

The term "charterparty" is said to represent the Latin expression "*charta partita*," and to be derived from the old practice of having the contract and counterpact engrossed on one sheet which was divided and the parts interchanged upon the execution of the instrument. The origin of the expression is similar to that of the word "indenture." The practice of cutting the two parts of the instrument from

one sheet is, as well in the charterparty as in the indenture, long obsolete.

The forms of a charterparty are various. They have been referred to as falling into three classes: namely (1) *Locatio navis*, a demise of the ship itself with its furniture and apparel; (2) *Locatio navis et operarum magistrie*, a demise of the ship in a state fit for the mercantile adventure; and (3) a contract for the carriage of the merchant's goods in the owner's ship, and by his servants.

This mode of classification does not, however, entirely suffice for the solution of the question who is to be regarded as the owner of the ship, responsible for the delivery of goods shipped under a bill of lading signed by the master. It is clear, on the one hand, that where goods are shipped on board a vessel, and the shipment acknowledged by a bill of lading signed by the master, and if the goods are not delivered, or delivered in a damaged state, otherwise than by reason of the excepted perils, the shipper is entitled to maintain an action against the owner of the ship. But the question remains, who is, for this purpose, to be considered as the owner of the ship at the time the liability arises? One criterion has been said to be, whether there was, or was not, a demise of the ship. Another is, whether the master is to be considered as the servant of the original owners of the ship or of the charterers. And of this the circumstance that he was appointed, and still more that he was liable to be dismissed, by one or other of the parties, is evidence. But the question who is to be regarded as the owner of the ship for the purpose of fixing the liability, depends not upon any technical expression, but upon the whole tenor of the charterparty: *Newberry v. Colvin*, *Colvin v. Newberry* (1830, 1832), 7 Bing. 190; 1 Ch. & Fin. 293 (5 R. C. 609); *Baumwoll Manufactur, Von Carl Scheibler v. Furness* (1893), A. C. 8; cf. *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86; 36 L. J. Q. B. 58.

By entering into a charterparty, the shipowner impliedly undertakes that the ship shall be reasonably fit for the carriage of a reasonable cargo of the description specified in

the charterparty; and, if the ship is not so fit, and cannot be made so without a delay which would frustrate the object of the voyage, the charterers may decline to put a cargo on board, and recover damages against the shipowner for breach of contract: *Stanton v. Richardson*, *Richardson v. Stanton* (C. P. 1872, Ex. Ch. 1874), L. R. 7 C. P. 421; 9 C. P. 390; 41 L. J. C. P. 180; 43 L. J. C. P. 230 (5 R. C. 631). The implied warranty attaches at the time of sailing on the voyage, although, under the charter, the ship has to proceed from the place where she lies at the time of the charter, to the loading berth as ordered: *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377; 45 L. J. Q. B. 436; *Cohn v. Davidson* (1877), 2 Q. B. D. 455; 46 L. J. Q. B. 305.

Where, by charterparty, a vessel is to proceed with all possible despatch (dangers and accidents of navigation excepted) to port A., and there load a cargo of a specified description for a voyage to port B., the cargo being required, in the knowledge of both parties, for a certain purpose, which is frustrated by the arrival of the vessel at port A. so late as to put an end, in a commercial sense, to the adventure, the charterer is discharged from any obligation under the contract. If the delay is occasioned by excepted perils, the shipowner is also excused; but where the charterer had declined, as he was entitled to decline, to load the cargo, the shipowner has been held entitled to recover on a policy of insurance (against such perils) of chartered freight: *Jackson v. Union Marine Insur. Co.* (C. P. 1873, Ex. Ch. 1874), L. R. 8 C. P. 572; 10 C. P. 125; 42 L. J. C. P. 284; 44 L. J. C. P. 27 (5 R. C. 650).

A *bill of lading* is a contract made between the shipper and the shipowner, acting through the master (or captain) of the ship, as his agent, by which the latter undertakes the safe carriage of the goods, subject to the exception of certain enumerated perils, from the port of loading to the port of destination, "deliverable to the shipper [or consignee] or his assigns, he or they paying freight." The effect of the instrument in giving a power of disposal of the *property* has already been stated (p. 255, *supra*). And

by the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111, s. 1), the right of suing and liability to be sued upon the contract, in the case where the entire property is transferred by the bill of lading, is transferred to the person to whom the property so passes.

The signature of the bill of lading by the master is *primâ facie* evidence against the shipowner that the goods mentioned in the bill of lading have been received on board. But it is not conclusive against the shipowner; and the shipowner may rebut the *primâ facie* evidence by showing that he received a less quantity of goods to carry than is acknowledged by his agent, the master: *McLean & Hope v. Fleming* (1871), L. R. 2 H. L. Sc. 128 (5 R. C. 665). And by sect. 3 (1) of the Bills of Lading Act, 1855, the master's signature is not conclusive against the master himself if he was led by the fraud of the shipper to sign the bill of lading under a mistake as to the quantity on board: *Valieri v. Boyland* (1866), L. R. 1 C. P. 382 (5 R. C. 675).

In every contract for carriage of goods by sea there is—if not expressed, as it generally is, in the bill of lading—an implied warranty on the part of the shipowner that his ship is, at starting for the voyage, seaworthy and fit for the purpose of carrying the goods undertaken to be carried: *Steel v. State Line S.S. Co.* (1877), 3 App. Ca. 72; *Tattersall v. The National S.S. Co.* (1884), 12 Q. B. D. 297 (4 R. C. 697). The implied warranty has been held to extend to defects which were latent at the commencement of the voyage: *The Glenfruin* (1885), 10 P. D. 103; and in consequence of this decision it has become not infrequent, in the bill of lading, to make a special exception of latent defects which cannot be provided against by ordinary care. See *Cargo ex Laertes* (1887), 12 P. D. 187.

With reference to the exceptions in the contract for carriage of goods by sea, it is to be remembered that in such a contract the shipowner is, in the absence of express stipulation to the contrary, answerable (like a common carrier by land) for losses from all causes—the act of God and the Queen's enemies only excepted: *Nugent v. Smith* (C. A.

1876), 1 C. P. D. 19 (1 R. C. 216, *et seq.*). And the exceptions have been strictly construed. In particular it requires clear and express words to exempt the shipowner from the consequence of negligence on the part of his servants. And the exception of "perils of the seas" has been held not sufficient to exempt the shipowner from loss by a collision caused by the fault of those navigating the ship: *Grill v. General Iron Screw Colliery Co.* (C. P. 1866, Ex. Ch. 1868), L. R. 1 C. P. 600; 3 C. P. 476. It may here be noted that the effect of this exception in the bill of lading has been held to be not exactly the converse of the effect of the same words in a contract of insurance; not—as it has been explained by Lord HERSCHELL in *Wilson v. Owners of Cargo ex Xantho* (H. L. 1887), 12 App. Cas. 503—that the words "perils of the seas" receives a different construction in the word "instruments," but that in a contract of insurance the rule is "*causa proxima spectatur*": whereas, in giving effect to the exception in the bill of lading, you may look behind the immediate cause, to the more remote cause—viz. negligence—without which the loss would not have happened. Where there is a collision without negligence on the part of the carrying ship, the direct loss occasioned by the collision is covered by the exception of "dangers and accidents of the seas": *Wilson v. Owners of Cargo ex Xantho, supra*. And if negligence is set up, it must be expressly alleged and proved: *The Glendarroch* (1894), P. 226 (24 R. C. 372, *et seq.*).

Again, the exception, in a contract for carriage of goods by sea, of "barratry" does not include a negligent act on the part of the master or mariners. For *barratry* is an act of wilful misconduct, contrary to the duty of the service, and quite distinguishable from negligence, which implies inadvertence or mistake: *Grill v. General Iron Screw Colliery Co., supra*.

Contracts for carriage by land are frequently not reduced to an instrument in writing. Where a person holds himself out as a common carrier, and receives goods to be carried to a particular destination, he is, at common law,

bound, by what has been called the custom of the realm, to carry them to their destination, insured against all perils, the “act of God and the King’s enemies” only excepted. The so-called “custom of the realm” arose, no doubt, in a state of society where the risk of property in transit was materially increased by collusion with thieves on the part of those who were entrusted with the goods; and it has been held to apply to innkeepers as well as common carriers. The rule had its parallel in the well-known edict of the Prætor in Roman law—“*Nautæ, Compones, stabularii quod cujusque saluum fore receperint nisi restituent, in eos iudicium dabo*” (Dig. 4, 9. 1). The common law rule has been modified in practice by special contracts and by Acts of Parliament, particularly the Carriers Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 68), and the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

By the former of these Acts (11 Geo. IV. and 1 Will. IV. c. 68) it was enacted (sect. 1) “that no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles of property of the descriptions following” (here are described various classes of valuable property which may be packed in a small compass) “contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance,” where the value of the property exceeds £10, unless the value and nature of the property is declared by the sender, and an increased charge accepted by the carrier, as provided by the Act. The Act further provides for notices to be fixed in the receiving offices of the rates of increased charge to be demanded; and reserves to the carrier the power of making special contracts. And the Act (sect. 8) was declared to be no protection to the carrier against responsibility for felonious acts of their servants, or against liability for their own personal neglect or misconduct. In the case of loss by an act within this exception, it is obvious that the Act gave the carrier the benefit of shifting the burden of

proof, if an article, the value of which was not declared according to the Act, was lost.

The power reserved to carriers, by the Act of 1830, to make special contracts, was at that time already claimed by carriers, who sought to restrict their liability by giving notice that they would not be answerable for loss, except on conditions limiting the extent of their common law liability as carriers. How far such notice, unless brought home to the other party to the contract, would be effectual to restrict the liability, was, before the Act of 1854, above mentioned, a question open to discussion. But when the right to limit their liability in such a way came to be asserted by railway and other companies, who, under the privilege of their special Acts, enjoyed a practical monopoly of the carrying trade, it was considered time for the Legislature to intervene. And, by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), it was, by sect. 7, enacted that every railway company and canal company shall be liable for loss or injury to the goods carried, occasioned by the neglect or default of the company or their servants (such liability being limited as specified in the Act, unless the value was declared and compensation paid upon the increased risk); and that no special contract between the carrying company and the other party should be binding on the other party unless signed by such party or the person delivering the goods for carriage, and also (in effect) unless the conditions were adjudged just and reasonable. It was further provided that nothing in this Act was to affect the provisions of the Carriers Act, 1830, with respect to articles of the description therein mentioned. The provisions of the Act of 1854 were extended to steam vessels by the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92, s. 31).

Of course, the requirement that the conditions should be "just and reasonable" has been the subject of much judicial construction. A leading case on the subject is that of *Peek v. North Staffordshire Ry. Co.* (H. L. 1863), 10 H. L. C. 473.

There is a decision of a Divisional Court of the Queen's Bench (LAWRENCE, J., and WRIGHT, J.) in *Shaw v. G. W. Ry.*

Co. (1894), 1 Q. B. 373, which gives a curiously narrow construction to "neglect or default of the company or its servants," in the 7th section of the Act of 1854. It was decided, in regard to goods which did not come within the scope of the Carriers Act, 1830, that the company might protect themselves against theft by their own servants (where there was no negligence on the part of the company) by notice brought home to the other party, although the special contract contained in such notice was not "reasonable" within the Act of 1854. This decision seems questionable on principle (see note, 5 Ruling Cases, p. 342).

The general rule, as determined by the House of Lords in *Peck v. North Staffordshire Ry. Co.*, may be briefly expressed as follows. A common carrier, in order to avoid liability, otherwise than by the act of God or the King's enemies, must show that his liability is limited by statute, or by a lawful special contract, or that the loss or damage arises from inherent vice or natural deterioration of the object carried, or from negligence on the part of the bailor (5 Ruling Cases, p. 286).

The contract to carry passengers does not come within the business of a common carrier, and it has been stated on high authority that, in a contract to carry a passenger, no more than ordinary care as to the sufficiency of the carriage is implied: *Christie v. Griggs* (1809), 2 Camp. 79. But the introduction of rapid modes of conveyance, and the practical monopoly enjoyed by railway companies, has tended to the exaction of a higher degree of responsibility. Still, there is no implied warranty, as in the case of a ship carrying goods, of the sufficiency of the vehicle; but the obligation undertaken is merely to take *due care* (including the use of skill and foresight) to carry the passenger safely: *Readhead v. Midland Ry. Co.* (Ex. Ch. 1869), L. R. 4 Q. B. 379.

(iii.) Warehousing contracts.

The duty of a *warehouseman* is so far distinguished from that of a carrier, that there is nothing to throw doubt on the validity of any special contract he may make in regard to the risk. In the absence of a special contract, he clearly

undertakes no risk in the nature of insurance against accident; nor is there any reason, on principle, to charge him with the felonious act of a servant employed by him, if there were no reason to impute negligence in his selection of a servant. He is simply liable for negligence (*culpa*) in the ordinary sense of the word, as applied to the care usually expected from persons acting in the way of business.

(iv.) Contracts for hire, and other bailments not included in the foregoing classes.

In all these bailments—that of the person possessed of a chattel hired, that of the tailor who is given clothes to mend or cloth to make up into a suit, or the agisting farmer, or the distrainor before sale, or the like—the bailee is merely liable for the want of ordinary care.

By the ordinary contract of hiring, the possession and transient property in the chattel is transferred for a particular time or use, on condition to restore the chattel as soon as the time or use is expired or performed, together with the price or recompense expressly agreed on by the parties, or left to be implied by law according to the value of the service. By the contract, the hirer gains a temporary property in the thing hired, accompanied by an implied condition to use it with moderation, and not to abuse it; and the owner or lender retains a reversionary interest in the chattel, and acquires a new property in the price or reward. Thus, if a man hires a horse for a month, he has the possession and qualified property during that period, on the expiration of which his qualified property determines, and the owner becomes entitled to the price for which the horse was hired.

There is one species of the contract of hiring as to which doubts were formerly entertained by many good men, whether it was lawful, *in foro conscientiæ*, to stipulate for a price or recompense. That is to say, where money is lent on a contract, to receive, not only the principal sum again, but also an increase by way of compensation for the use; which has been called interest by those who think it lawful, and *usury* by those who do not. With the growth of

commerce, and the facilities for employing money at a profit, it became generally recognised that the stipulation of reasonable interest for a loan, having regard to the profit which the lender might otherwise have made for the use of his money, was not unlawful nor unconscionable. Only, where the amount exceeded this reasonable interest, the term *usury* was still applied. To restrain the exaction of *usury*, in this sense, various statutes were from time to time made, forming a body of law known as "the usury laws." In some contracts, where the repayment depended on a condition, such as the safe arrival of a ship at the end of a voyage, it was recognised that, in addition to the reasonable interest, a recompense might be charged for the hazard to which the principal was put. But no regard was paid to the most common hazard of all, namely, the loss of the principal by the borrower becoming unable to repay it: *Morse v. Wilson*, 1791, 4 T. R. 353. The usury laws were, however, finally repealed for the United Kingdom by the Usury Laws Repeal Act, 1854 (17 & 18 Vict. c. 90).

CHAPTER XL.

INSURANCE (a).

FOLLOWING the arrangement at p. 337, *supra*, the next topic is—

(c) Insurance.

A contract of insurance is made between X. and Y., where X. has property, or an interest in the nature of property, in something which is exposed to peril, and Y., in consideration of a *premium*, or money given, promised, or paid by X., agrees to make good to X. the loss which he would suffer by the emergence of one or more of the perils contemplated.

The obligations and effects resulting from the contract

(a) This chapter was substantially written before the passing of the Marine Insurance Act, 1906 (6 Ed. VII. c. 41). Subject, however, to a general reference to this Act, so far as relates to marine insurance, I see no reason to alter what I have written.—R. C.

of insurance will now be considered under the following heads:—

1. Insurable interest.
2. The method of making the contract.
3. Representation and concealment.
4. Inception and duration of the risk.
5. Rules of construction, including (a) General rules ; (β) Implied warranties or conditions ; (γ) Express warranties and exceptions ; (δ) Valued policies ; (ε) Suing and labouring clause.
6. Effect of deviation.
7. The rule as to cause of loss : *causa proxima spectatur*.
8. Abandonment and total loss.
9. General average loss.
10. Adjustment of losses ; and
11. Return of premium.

1. INSURABLE INTEREST.

The simple principle that, in order to constitute the contract of insurance, the person insured must have what is called an insurable interest, was, in English law apart from statute, obscured by the circumstance that a wager could be enforced by law. The distinction between a mere wager and a contract of insurance was, however, recognised even by English lawyers before it was embodied in statute. The difference was made effective in regard to marine insurance by the Marine Insurance Act, 1745 (19 Geo. II. c. 37), now repealed by the Marine Insurance Act, 1906 (6 Edw. VII. c. 41). The same principle is embodied in the Act of 1906. This Act (by sect. 4) enacts that (1) every contract of marine insurance by way of gaming or wagering is void ; and (2) a contract of marine insurance is deemed to be a gaming or wagering contract (a) where the assured had not an insurable interest as defined by the Act, and the contract is entered into with no expectation of acquiring such an interest ; or (b) where the policy is made “interest or no interest,” or “without further proof

of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like terms: provided that where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

The subject of insurable interest was much discussed in the case of *Lucena v. Crauford* (1802-1806), 3 Bos. & P. 75; 2 Bos. & P. (N. R.) 269; 1 Taunt. 325 (13 R. C. 150).

The question there arose out of an insurance on Dutch ships taken possession of, before a declaration of war, by Commissioners (commonly called "the Dutch Commissioners") appointed under the powers of an Act of the British Parliament, which authorised the Commissioners to take possession, manage, and dispose of the ship. It was held by the House of Lords, reversing the decision of the King's Bench and Exchequer Chamber, that, as to one of the ships which was lost after the declaration of war, the Commissioners, as such, had no insurable interest, because the Act could not affect the King's prerogative; and, as to the ships which were lost before the declaration of war, the Commissioners had no insurable interest, because the Act could not change the property as against foreigners. But, on a second trial, where the interest was averred and found to have been in the King, and the insurance effected by the Commissioners as agents on His Majesty's behalf and by his order, it was held that the action was well laid, and that the Commissioners might recover on behalf of the King. The points determined by Lord ELDON were the following:—(1) the seizure of the ships, before coming into a British port, must be taken to have been done as an act of State under the King's prerogative, and not under the Act of Parliament; (2) after the commencement of hostilities—the ships being then enemies' property in the possession of the King's officers—the Commissioners could not dispose of them against the Crown, because the Act could not be intended to affect the rights of the Crown; (3) neither could they be disposed of as against the foreigners; for, if

a ship be taken by hostile force, the title to that ship, as against foreigners, cannot be changed by any Act of local legislation; but the ship must be condemned in a Court proceeding according to the law of nations, on rules binding not only on the subjects of the country where the Court is held, but on foreigners who are not so; (4) an insurable interest is not created by a mere expectation, but must be a right in the nature of property, or arising out of some contract about the property, or at least a right of possession with power of disposal; (5) on capture under the King's authority, the King may be considered, as against all the world, as having an interest in the property, before condemnation, for the purpose of insuring; (6) a trustee, having a legal interest in the thing, may insure; (7) a consignee or agents, having the power to sell, may insure; (8) an agent, having a mere naked right to take possession, may insure if he states the interest to be in his principal; and (9) insurable interest, under the statute 19 Geo. II. c. 37, must exist and be averred from the commencement of the risk to the time of loss.

Under the Prize Act, 1805 (45 Geo. III. c. 72, s. 3), which remained in force during the war then going on, it was declared that the captors should have the entire interest after adjudication as prize. Under that Act, it was decided that the captors had an insurable interest in the captured ship, even before condemnation. But this Act is long expended, and is formally repealed by 27 & 28 Vict. c. 23. The Naval Prize Act, 1864 (27 & 28 Vict. c. 25, s. 55 (2)), contains an express proviso against any interest being created except by grant of the Crown; and it is clear that an expectation founded upon the usual practice of the Crown in administering a discretionary power would not create an insurable interest. See *Routh v. Thompson* (1809), 11 East, 428 (10 R. R. 539).

On a sale of goods the question of insurable interest depends frequently, though not always, on whether the property in the goods has passed to the buyer. If the vendor has insured the goods, it is a question of intention

of the contract whether the benefit of the policy is to be transferred; and if that is the intention, the vendor may recover on the policy as a trustee for the purchaser. If there is no such intention, the contract of insurance is determined by the transfer of the risk: *Powles v. Innes* (Ex. 1843), 11 M. & W. 10 (13 R. C. 356). In *Anderson v. Morice* (1876), 1 App. Cas. 713, where there is a great conflict of judicial opinion, the risk was ultimately decided to lie with the owners, who had not been divested of the property. The contract in this case was for purchase of the cargo of new-crop rice per *Sunbeam*. The ship sank while the loading was going on; and the question was whether the purchaser had an insurable interest in the bags of rice which had been already placed on board. The Court of Exchequer Chamber, by a majority, reversing the decision of the Court of Exchequer, held that the purchaser had no insurable interest; and this decision eventually was affirmed in the House of Lords, on an equal division of opinion among the Law Lords who heard the case. But where a cargo is purchased to be shipped f.o.b. ("free on board"), it is understood to be the intention of the contract that the goods, when placed on board, are to be at the risk of the purchaser, and this is sufficient to create an insurable interest, whether the property in those specific goods has passed or not: *Inglis v. Stock* (H. L. 1885), 10 App. Cas. 263; *Colonial Insur. Co. of New Zealand v. Adelaide Marine Insur. Co.* (P. C. 1886), 12 App. Cas. 128.

A carrier, who is himself liable as an insurer, has an insurable interest in the goods carried: *Crowley v. Cohen* (1832), 3 B. & Ad. 478 (13 R. C. 314). And a bailee who has by a special contract undertaken the risk as an insurer, has likewise an insurable interest: *Hill v. Scott* (1895), 2 Q. B. 371, 713; *North British and Mercantile Insur. Co. v. London, Liverpool and Globe Insur. Co.* (C. A. 1877), 5 Ch. D. 569; 46 L. J. Ch. 537.

A consignee having the legal property and immediate right to possession under the bills of lading, and the power to sell and manage the consignment, is entitled to insure

in his own name, and to recover in an action on the policy to the full value of the goods, averring the interest in himself. And although the bills of lading are in the hands of bankers who have accepted bills of exchange and taken the bills of lading by way of pledge—the consignees having the right to obtain the bills of lading upon payment of the bills of exchange—it seems the better opinion that the consignees have still the like insurable interest: *Ebsworth v. Alliance Marine Insur. Co.* (C. P. 1873), L. R. 8 C. P. 596; 42 L. J. C. P. 305 (13 R. C. 214).

An agent has in any case an insurable interest to the extent of his lien; and if he effects a policy without instructions, he is, if the act is ratified by the principal, “a person receiving the order to insure” within the meaning of the Act 28 Geo. III. c. 56: *Wolff v. Horncastle* (C. P. 1798), 1 Bos. & P. 316 (13 R. C. 265).

A person having an interest in the nature of property, or by contract, in the subject-matter of a commercial adventure, may, by apt language of description, insure the expectant value or profits depending on the success of the adventure: *McSwiney v. Royal Exchange Assur. Co.* (Q. B. 1849 and Ex. Ch. 1850), 14 Q. B. 634; *Wilson v. Jones* (Ex. Ch. 1867), L. R. 2 Ex. 139 (13 R. C. 299). So the lender upon a bottomry bond, as he takes upon himself the peril of the voyage, has an insurable interest in the ship: *Simmonds v. Hodgson* (1832), 3 B. & Ad. 50. The profit in the nature of freight which a shipowner expected to make by employing his own ship to carry his goods has been held sufficiently described in the name of “freight”: *Flint v. Flemyng* (1830), 1 B. & Ad. 45 (13 R. C. 693). The expressions “chartered freight” and “profit on charter” are illustrated by the cases of *Rankin v. Potter* (H. L. 1873), L. R. 6 H. L. 83 (1 R. C. 70), and *Asfar v. Blundell* (C. A. 1895), 1896, 1 Q. B. 123, which were cases of total loss of the profit intended to be covered by these expressions. Passage money, which is usually payable in advance, is not, at common law, the subject of insurable interest in the shipowner. But since the shipowner became liable

by the Passengers Act, 1852—and is now liable by the Merchant Shipping Act, 1894 (ss. 331-335)—to forward shipwrecked passengers, he may insure his statutory liability: *Gibson v. Bradford* (1855), 3 El. & Bl. 516.

If the subject-matter of an insurance is rightly described in the policy, it is not necessary to specify the interest of the insured, unless the interest is of such a nature as to be material to the risk insured against; and (except in such a case as last mentioned) the insured may recover upon the policy for such interest as he has: *Crowley v. Cohen* (1832), 3 Barn & Adol. 478 (13 R. C. 314).

A policy of insurance upon life is not, like a fire or marine policy, a contract of indemnity; and although by the Life Assurance Act, 1774 (14 Geo. III. c. 48), the insured can recover only to the extent of the interest which he had at the time of effecting the policy, it is no ground for refusing payment that the interest had ceased during the life: *Dalby v. India and London Life Assur. Co.* (Ex. Ch. 1854), 15 C. B. 365 (13 R. C. 383). It is always assumed that a person has an insurable interest in his own life. It has been laid down by Lord KENYON that a married woman has an insurable interest in the life of her husband: *Read v. Royal Exchange Assur. Co.* (1795), 2 Peak, 70. Whether the husband has an insurable interest in the life of his wife has been doubted by some text-writers in England. It has been assumed by high authority in Scotland that the wife has such an interest: *Wight v. Brown* (1849), Court of Session Cases, 2nd series, vol. ii. pp. 459, 470. By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93, s. 10), it was enacted that a married woman may effect a policy of assurance upon her own life or the life of her husband for her separate use; and that a policy of assurance effected by a married man upon his own life, and expressed to be for the benefit of his wife or children, or any of them, shall take effect as a trust according to the interest expressed. A similar enactment was made for Scotland by the Married Women's Policies of Assurance (Scotland) Act, 1880 (43 & 44 Vict. c. 26); and a similar enactment is

repeated by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 11), which repeals the Act of 1870 under reservation of any right already accrued under that Act.

2. THE METHOD OF MAKING THE CONTRACT.

By the ordinary practice at Lloyds, where the great bulk of sea-insurances are made, a slip or memorandum containing the minutes of the intended agreement is handed round, and initialled by the underwriters, who enter into the contract with the amounts for which they subscribe. In due course a stamped policy is (or ought to be) executed to carry out the terms contained in the slip. By reason of the stamp laws, the slip, which is not stamped, cannot be itself enforced as a contract. But it has been held that, where there is a properly stamped contract intended to carry out the terms of the slip, but by a mistake differing from those terms, the slip may be produced in evidence to show what the real contract was: *Motteux v. London Assur. Co.* (1739), 1 Atk. 545; *Ionides v. Pacific Fire and Marine Insur. Co.* (1871), L. R. 6 Q. B. 674; 7 Q. B. 517 (13 R. C. 467). These cases were decided before the Stamp Act, 1891 (54 & 55 Vict. c. 39), whereby it is provided (sect. 95 (2)) that the slip (which by sect. 91 is included in the term "policy of insurance") may, for the purpose of being given in evidence, be legally stamped after execution, under a penalty of £100. This appears to be intended to exclude the use of the slip, even as evidence, unless stamped with the penalty.

In regard to life assurance, it has been held that where the acceptance of a proposal has been qualified by the statement that no insurance shall take effect until the premium is paid, the payment of the premium is a condition precedent for the liability attaching. And if, in the mean time, a change of health has occurred, the company has been held entitled to refuse to accept the premium, and there was consequently no contract: *Canning v. Farquhar* (C. A. 1886), 16 Q. B. D. 727; 55 L. J. Q. B. 225.

3. REPRESENTATION AND CONCEALMENT.

It is an implied condition, essential to the liability of the insurer upon a contract of marine insurance, that the insured discloses all the circumstances within his knowledge material to the risk. For this purpose the knowledge of the agent effecting the insurance, as well of an agent of the insured (such as the master of a ship), whose duty it is to communicate the circumstances to the insured, is imputed to the insured: *Carter v. Boehm* (1765), 3 Burr. 1905 (13 R. C. 501). The date of sailing of a ship is a material circumstance, if tending to produce the impression that the ship is overdue: *Stribley v. Imperial Marine Insur. Co.* (1876), 1 Q. B. D. 507 (13 R. C. 491).

A positive statement of a fact material to the risk, made by the agent effecting the insurance, if the statement is untrue, avoids the insurance: *Macdowall v. Fraser* (1779), 1 Dougl. 259. And a positive statement of an event in the future which is in the control of the agents of the insured, appears to have the same effect: *Dennistoun v. Lillie* (1821), 3 Bligh 202 (22 R. R. 13).

On the other hand, the mere statement of an expectation of a circumstance not within the control of the insured, if made *bonâ fide*, is not a representation to avoid the policy, although the expectation is not borne out by the event: *Barber v. Fletcher* (1779), 1 Dougl. 305; *Bowden v. Vaughan* (1809), 10 East, 415 (13 R. C. 551).

A representation only differs from a warranty in this, that in order to avoid the policy, the fact represented must be such as materially to affect the risk: whereas a warranty must be strictly and literally complied with: *Pawson v. Watson* (1778), 2 Cowp. 785 (13 R. C. 540). Where a ship is insured for a voyage "at and from" a foreign port, these words do not import a warranty that the ship is in the port at the time of effecting the policy; but if she arrives there so late that the risk of the voyage contemplated is materially varied, the policy does not attach: *Parmeter v. Cousins* (1809), 2 Camp. 235; *De Wolf v. Archangel Maritime Bank, &c. Co.* (1874), L. R. 9 Q. B. 451 (13 R. C. 607).

4. INCEPTION AND DURATION OF THE RISK.

Where goods are insured on a voyage from A. to B., the risk to commence at and from the loading thereof on board, the intention is, *primâ facie*, that the loading is to take place at A. But this construction yields to an expression indicating that a prior loading is contemplated; as, for instance, where the policy is expressed to be in continuation of a former policy on goods shipped at a port (X.) from which the ship previously started; and in that case the goods, although shipped at X., are carried from A. to B.: *Spitta v. Woodman* (C. P. 1810), 2 Taunt. 416; *Bell v. Hobson* (K. B. 1812), 16 East, 240 (13 R. C. 568).

Under the clause for the insurance of goods to a certain port or place "to continue . . . until the same be there discharged and safely landed," the goods are protected by the policy while they are being carried in boats or lighters to the shore, according to the usual practice of the trade. But the insurer is discharged if, in the mean time, the insured takes the goods into his own possession by sending his own lighters for them or otherwise: *Hurry v. Royal Exchange Assur. Co.* (C. P. 1801), 2 Bos. & P. 430; *Strong v. Natally* (C. P. 1804), 1 Bos. & P. (N. R.) 16 (13 R. C. 619).

Where a ship is insured for a voyage and "until moored twenty-four hours in good safety," the risk is not at an end if, when she arrives, and is in fact moored, she has received her death-wound by a peril of the sea; or if during the twenty-four hours proceedings founded on a cause insured against are instituted, under which a loss eventually takes place: *Shawe v. Felton* (K. B. 1801), 2 East, 109; *Horneyer v. Lushington* (1811), 15 East, 46; *Samuel v. Royal Exchange Assur. Co.* (1828), 6 B. & C. 119 (13 R. C. 631).

Where a ship has arrived at one of the ports on the voyage contemplated, and, by force of circumstances, other than a risk insured against (*e.g.* by reason of a state of war with the government at the ultimate port of destination), the further prosecution of the voyage has become impossible or illegal, the insurance is at an end. And the insurance is

likewise at an end if the further prosecution of the voyage has been abandoned. But, if the further prosecution of the voyage has only become dangerous or difficult, and the voyage is only suspended without a breach of the conditions of the policy, and without abandoning the intention of prosecuting it, the insurance still remains in force: *Blackenhagen v. London Assur. Co.* (1808), 1 Camp. 454; *Brown v. Vigne* (K. B. 1810), 12 East, 283; *Oliverson v. Brightman* (Q. B. 1846), 8 Q. B. 781 (13 R. C. 650).

A policy on freight to be earned on the adventure of a seeking ship only attaches on the freight upon goods which have been put on board, or in respect of which there is a contract to ship them: *Forbes v. Aspinall* (K. B. 1811), 13 East, 323 (13 R. C. 673).

5. RULES OF CONSTRUCTION IN CONTRACTS OF INSURANCE.

(a) *General Rules of Construction.*

The ordinary rules of construction apply, except where by the usage of merchants and shipowners certain words have acquired a meaning distinct from the ordinary and popular sense: *Robertson v. French* (K. B. 1803), 4 East, 130 (14 R. C. 1).

Where there is an apparent discrepancy between the words inserted in writing and the printed form into which they are inserted, the written words, as being selected by the parties for the expression of their intention, receive effect: *Hydarnes S.S. Co. v. Indemnity Mutual Insur. Co.* (C. A.) 1895, 1 Q. B. 500. And see *Dudgeon v. Pembroke* (H. L. 1877), 2 App. Cas. 284 (14 R. C. 105).

General terms describing the adventure are construed to include all such acts or events as are by usage or necessary consequence incidental to the adventure: *Pelly v. Royal Exchange Assur. Co.* (1757), Burr. 341 (14 R. C. 30). So where a ship, insured "at and from Oporto to London," was blown out to sea and lost, while waiting outside the bar to complete her loading, and it was proved that the circumstances

of the ship so waiting was usual for vessels loading at Oporto, the insured was held entitled to recover: *Kingston v. Knibbs* (1758), 1 Camp. 508 n. (10 R. R. 742 n.).

Where agents insure "as well in their own name as for and in the name and names of all parties to whom the subject-matter of the policy may appertain," it is a question of intention, to be gathered from the instructions given to the agent, who are the parties insured: *Boston Trust Co. v. British, &c., Co.* (1906), A. C. 336.

The general opinion of merchants may be given as evidence of the understanding of merchants to explain expressions in a policy which are inadequate to explain themselves: *Camden v. Cowley* (1762), 1 W. Bl. 417 (14 R. C. 46). But usage cannot be permitted to contradict the plain words of a policy: *Blackett v. Royal Exchange Assur. Co.* (1832), 2 Cr. & J. 244 (14 R. C. 179).

(3) *Implied Warranties.*

In a voyage policy there is an implied warranty—in the sense of an essential condition—on the part of the insured, that the ship is, at the commencement of the voyage, in all respects seaworthy for the voyage: *Watson v. Clark* (H. L. (Appeal from Scotland) 1813), 1 Dow. 336; *Dixon v. Sadler* (*Sadler v. Dixon*, 1839, 1840), 5 M. & W. 405 (14 R. C. 49). This implied warranty is similar to the implied warranty of seaworthiness—in the sense of fitness to carry the goods on the voyage—which the law imposes on shipowners towards the owners of the goods they carry (see p. 351, *supra*).

But, if the voyage consists of distinct sections requiring different conditions of seaworthiness, and it is usual in such a voyage to complete the equipment at different points—as where the ship starts on a river to a port from which she enters on a sea voyage—it is a sufficient compliance with the warranty if she starts on each section of the voyage properly equipped: *Bouillon v. Lupton* (1863), 15 C. B. (N. S.) 113; 33 L. J. C. P. 37 (14 R. C. 72).

In a time policy there is no implied warranty of seaworthiness: *Gibson v. Small* (H. L. 1853), 4 H. L. C. 353; *Dudgeon v. Pembroke* (H. L. 1877), 2 App. Cas. 284 (14 R. C. 85). But where a vessel so insured has left port in an unseaworthy condition and expenses (by putting back or otherwise) have been incurred, not through any peril of the sea, but solely in consequence of her being unseaworthy, these expenses have been held not recoverable from the insurers: *Fawcus v. Sarsfield* (1856), 6 Ell. & Bl. 192; *Ballantyne v. Mackinnon* (C. A.), 1896, 2 Q. B. 455.

(γ) *Express Warranties.*

A warranty of the neutral character of a ship is sufficiently expressed by the description as "an American," or as the case may be: and, to comply with the warranty, the ship must be furnished with the necessary papers to establish her character according to the law of nations, or according to any treaty to which the government indicated in the description is a party: *Rich v. Parker* (1798), 7 T. R. 705 (14 R. C. 148). A sentence of condemnation by a Prize Court expressly proceeding on the ground of nationality is conclusive as to the nationality in a question of insurance. See English notes, 14 Ruling Cases 169.

A statement written in the margin of a policy is a warranty, and, in order to make the insurer liable, must be strictly complied with: *De Hahn v. Hartley* (1786), 1 T. R. 343 (14 R. C. 171).

A warranty to "sail from" a certain port at a time named has been construed to mean that the vessel must (in ordinary circumstances) be out of port and at sea by the time named: *Moir v. Royal Exchange Assur. Co.* (1815), 3 M. & S. 461. Whether a vessel has "sailed" at a given time is a question of fact and intention. If the ship, being ready for the voyage, has quitted her moorings with the intention of at once going on her voyage, she is considered to have sailed, although she may, by reason of some unforeseen contingency, be again anchored in the port or place before finally going

on her way. But if she has merely left her moorings in an imperfect state of preparation for the voyage, intending to complete her preparations and finally set sail from another point, and she does not accomplish this within the time limited, this is not a sailing within the warranty: *Bond v. Nutt* (1777), 2 Cowp. 608; compare *Cochrane v. Fisher* (1834, 1835), 2 Cr. & M. 581; 1 Cr. M. & R. 809, and other cases in note, 14 Ruling Cases 175. Where, however, the voyage commences with a river passage, on which it is customary and convenient to enter in a state of preparation different from that of the sea voyage, the ship starting on the river passage in the usual, and a sufficient, state of preparation, is said to have sailed on the voyage, although something remains to be done to make her seaworthy for the sea voyage: *Bouillon v. Lupton* (1863), 15 C. B. (N. S.) 133 (14 Ruling Cases 72, p. 368, *ante*).

Where a ship, insured "at and from New York to Quebec, during her stay there, and thence to the United Kingdom, the said ship *being warranted* to sail from Quebec on or before the 1st of November," sailed from New York on the 15th of October, and was lost, after the 1st of November, on the voyage from New York to Quebec, the warranty was construed to be only a stipulation that, so far as relates to the voyage from Quebec to the United Kingdom, the underwriters were not responsible unless the ship sailed from Quebec by the 1st of November. The warranty could not be taken literally, otherwise the ship would be uninsured for the part of the voyage from New York to Quebec: *Baines v. Holland* (1855), 8 Ex. 802, 14 R. C., p. 176.

A warranty to depart with convoy requires the ship to depart with convoy for the whole voyage, and is broken by neglect on the part of those navigating the ship to keep up with convoy. A warranty of neutrality is satisfied if the property is neutral at the commencement of the risk, provided the neutral character is not forfeited by the act of the insured. See notes, 14 Ruling Cases 177.

In a voyage policy on ship "free from average under £3 per cent. unless general," partial losses incurred at different

times may be added together to take the loss out of the exception: *Blackett v. Royal Exchange Assur. Co.* (Ex. 1832), 2 Cr. & J. 244 (14 R. C. 179).

Under the common memorandum relating to a cargo of corn, fruit, etc., "warranted free from average unless general, or the ship be stranded," the term "stranded" does not apply to the mere fact of the ship taking the ground within a tidal harbour in a usual and foreseen manner, but implies the occurrence of some accident whereby the ship is grounded unexpectedly or upon some dangerous substance such as piles or stones in a place where she is intended to rest upon a yielding surface. Under such a memorandum the fact of "stranding," although not in itself the cause of damage, lets in the claim for an average loss: *Burnett v. Kensington* (K. B. 1797), 7 T. R. 210; *Wells v. Hopwood* (K. B. 1832), 3 B. & Ad. 20 (14 R. C. 187).

(δ) *Valued Policies.*

A valued policy is one which states the value, as between the insured and insurers, of the interest of the insured in the subject-matter. This valuation is conclusive between the parties, whether the loss is total or partial, except in the case of fraud: *Lewis v. Rucker* (1761), 2 Burr. 1167; *Irving v. Manning* (1847), 6 C. B. 391; *Barker v. Janson* (1868), L. R. 3 C. P. 303; 37 L. J. C. P. 105 (14 R. C. 215).

Under a valued policy it is sufficient for the insured to prove interest, without proving the amount of his interest: *Feise v. Aguilar* (1811), 3 Taunt. 506 (12 R. R. 695).

Where there is a partial loss, the insured on a valued policy is entitled to recover from the underwriter a sum bearing the same proportion to his subscription as the loss bears to the whole value in the policy: *Goldsmid v. Gillies* (1813), 4 Taunt. 803 (14 R. R. 671).

A valuation of freight is *primâ facie* calculated on all the goods the ship is intended to carry. And if only part of a cargo is shipped or contracted to be shipped, the risk only attaches in respect to such a part, and the insured can only

recover a proportion of the valuation, having regard to the proportion which this amount bears to the intended cargo: *Forbes v. Aspinall* (K. B. 1811), 13 East, 323 (13 R. C. 673). This is consistent with the rule that the valuation is conclusive, for it is still binding as to the value of the freight to which the risk attaches. See *Denoon v. Home and Colonial Assur. Co.* (1872), L. R. 7 C. P. 341 ; 41 L. J. C. P. 162.

Where the insured has already recovered a sum by way of indemnity for the loss ; whether the valuation is conclusive in a question between the insurer who has paid the loss and a third person against whom the insurer, as subrogated to the right of the insured, claims indemnity (by reason of a collision or otherwise), has been questioned. In *North of England Iron S.S. Insur. Assoc. v. Armstrong* (1870), L. R. 5 Q. B. 244, Lord COCKBURN and his colleagues decided this in the affirmative. But the principle is doubted by Lord BLACKBURN in *Burnard v. Rodocanachi* (H. L. 1882), 7 App. Cas. 333. This last case was one arising out of an indemnity paid under the American Act of Congress (for distribution of the Alabama compensation money), which expressly provided against the benefit going to the insurer. So that it was not necessary to overrule the decision in *North of England S.S. Insur. Assoc. v. Armstrong*.

It has been frequently stated that fraud is the only ground for setting aside the valuation. But where a highly speculative value is placed on the profits of an adventure, that is a material circumstance to be disclosed to the underwriter. So that the non-disclosure may have a similar effect to that of fraud in the valuation itself: *Ionides v. Pender* (1874), L. R. 9 Q. B. 531 ; 43 L. J. Q. B. 227.

When a policy is effected on goods "as may be thereafter declared and valued," this gives the assured a power, by duly declaring and valuing before intelligence is received of the loss, to make it a valued policy ; but if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial: *Harman v. Kingston* (per Lord Ellenborough, 1811), 3 Camp. 150 (14 R. C. 232).

(ε) *Suing and Labouring Clauses.*

The common clause, called the suing and labouring clause, is as follows: "and in case of any loss or misfortune, it shall be lawful to the assured, their factors, etc., to sue, labour, and travel for, in, or about the defence, safeguard, and recovery of the said goods and merchandise and ship, etc., or any part thereof, without prejudice to the insurance: to the charges whereof we the assurers will contribute, each one according to the rate and quality of his sums herein insured."

Under this clause it has been held that the assured may recover expenses in the nature of the salvage incurred at his request, although he is debarred from claiming the principal loss by reason of a warranty against particular average: *Kidston v. Empire Marine Insur. Co.* (C. P. 1866, Ex. Ch. 1867), L. R. 1 C. P. 535; 2 C. P. 357 (14 R. C. 247). A claim of salvage, properly so-called, does not depend on the request of the insured, but arises upon the general maritime law, and is a loss arising directly from the peril insured against. And it has been decided by the House of Lords that salvage services, properly so called, cannot be claimed under the suing and labouring clause so as to bring the total claim under the policy to more than 100 per cent. of the sum underwritten: *Aitchison v. Lohre* (H. L. 1879), 4 App. Cas. 755; 49 L. J. Q. B. 123 (14 R. C. 448).

6. EFFECT OF DEVIATION.

A wilful deviation from the due course of an insured voyage puts an end to the liability of the insurer; and for this purpose the cause from which, or the place in which, the subsequent loss arises is immaterial: *Elliot v. Wilson* (H. L. 1776), 4 Brown, P. C. 470. But if the cause of the loss occurs before the deviation has actually taken place, and no loss arises in the course of the voyage after the deviation, the deviation, although intended when the ship sets sail, does not discharge the insurer: *Hare v. Travis*

(K. B. 1827), 7 B. & C. 14. See 9 Ruling Cases 351, and notes, p. 361.

Under a policy for a voyage from X. to Y., with liberty to call or touch at Z., this liberty is construed according to what appears to be the scope or purpose of the voyage. If the ship puts in to Z., and stays there for a purpose within that scope, and meantime does something else which does not interfere with the purpose of the voyage, this is not a deviation; but if the ship puts in at Z. for a purpose wholly unconnected with the scope or purpose of the voyage, this is a deviation: *Raine v. Bell* (K. B. 1808), 9 East, 195; *Hammond v. Reid* (K. B. 1820), 4 B. & C. 72 (9 R. C. 365, and notes).

Where a voyage is described in a policy as one to "ports of discharge" described generally, it is a deviation to go back to a port out of the geographical order; but where the voyage is described as one from A. to B. and C., it is a deviation (unless there is a regular and settled course of trade to the contrary) for the ship to go to C. first: *Clason v. Simmonds* (1741), 6 T. R. 533; *Beatson v. Haworth* (1796), 6 T. R. 531 (9 R. C. 383). These rules, however, yield to slight indications in the context of the intention to give a wider liberty, according to circumstances, in the course of the voyage. See 9 R. C. 383, and notes.

Delay at an intermediate port, if incurred for a purpose not within the scope of the purpose of the voyage, has been held to be deviation: *Williams v. Shee* (1813), 3 Camp. 469; *Hartley v. Buggin* (K. B. 1781), 3 Douglas, 39 (9 R. C. 390, and notes). The reason is explained by TINDAL, C.J., in *Mount v. Larkins* (1831), 8 Bing. 108, as follows: "The reason upon which a deviation discharges the insurer is not that the risk is thereby increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself." On the other hand, detention at a port incurred for the purpose of the intended adventure, and for a time which is not unreasonable having regard to that purpose, does not constitute a deviation:

Phillips v. Irving (C. P. 1844), 7 M. & G. 325 (9 R. C. 396, and notes).

An express liberty to do what would otherwise be construed as a deviation, is strictly construed. Thus a policy of insurance on a ship on a certain commercial voyage, with or without letters of marque, and with leave to "chase, capture, and man" prizes, was held not to authorise delay (after capture of a prize) by shortening sail so as to allow the prize to keep up, and so be convoyed into port in order to be condemned as a prize: *Lawrence v. Sydebotham* (K. B. 1805), 6 East, 45 (9 R. C. 402).

Deviation is excused by unavoidable necessity: 9 R. C. 383, *et seq.*

In numerous cases, the endeavour to avoid capture has been held to justify deviation: *Driscoll v. Bovill* (1798), 1 Bos. & Pul. 313. And, in time of war, a deviation in order to join convoy is justifiable: *Bond v. Gonsales* (1704), 2 Salk. 445. And see other cases cited in note, 9 R. C. 415. In all such cases the continued intention to proceed on the voyage so far as possible is an element. Contrast *Blackenhagen v. London Assur. Co.* (1808), 1 Camp. 454, where the vessel abandoned the voyage in consequence of an embargo, and this was held to have discharged the insurers.

"Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods' owner in respect of loss that would otherwise be within the exception of 'perils of the seas'; and, as a necessary consequence, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation." This principle is laid down by COCKBURN, J., in an elaborate judgment reviewing the various dicta to be found in previous cases, in *Scaramanga v. Stamp* (C. A. 1880), 5 C. P. D. 295, 304.

7. THE RULE "CAUSA PROXIMA SPECTATUR."

Where property is insured against certain classes of perils, or where certain classes of perils are excepted, the rule as to whether the cause of loss falls within the class, is "causa proxima spectatur."

Goods were insured, pending the war between the Northern and Southern (Confederate) States of America, warranted free from (*inter alia*) "all consequences of hostilities." The captain of the navigating ship, having lost his reckoning, and being deceived as to his true position owing to the fact that a certain light had been extinguished by order of the military authorities of the Confederate States, ran his ship aground; and the cargo, with the exception of a part which had been salvaged, was taken possession of by the Confederate authorities. Perils of the sea, and not the hostilities, were held to be the proximate cause of the loss; and the insured was held entitled to recover: *Ionides v. Universal Marine Assoc.* (1863), 14 C. B. (N. S.) 259; 32 L. J. C. P. 170 (14 R. C. 271).

So the foundering of a ship owing to a collision at sea has been held by the House of Lords to be within the ordinary exception "perils of the seas" in a bill of lading: *Wilson v. Owner of Cargo ex Xantho* (1887), 12 App. Cas. 503. This is conclusive as to the effect of a similar circumstance in the case of goods insured against "perils of the seas." But in a contract of insurance, differing in that respect from a bill of lading, the circumstance that the loss is also due to negligence of those navigating the carrying ship is immaterial. On the other hand, the loss caused to the owner of a colliding ship by having to contribute to the greater damage to the other colliding ship, has been held not to be a loss by perils of the sea: *De Vaux v. Salvador* (1836), 4 Ad. & El. 420 (14 R. C. 305). This decision led to the adoption of what is called at Lloyds "the running-down clause," under which the ship-owner is insured against the liability for the excess of damage payable under the Admiralty rule, now incorporated

into the ordinary law by the Judicature Acts : see *London Steamship Owners Insur. Assoc. v. Grampian S.S. Co.* (C. A. 1890), 24 Q. B. D. 663. The usual running-down clause has been held not to give a claim to recover life-salvage under sect. 544 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

A loss by stranding in consequence of negligent navigation has been held to be proximately caused by perils of the sea : *Trinder v. North Queensland Insur. Co.* (1897), 66 L. J. Q. B. 802. And where a ship is insured against (*inter alia*) fire, the insurer is liable for loss by fire caused by negligence of the master and crew : *Busk v. Royal Exchange Assur. Co.* (K. B. 1818), 2 B. & Ald. 73. In short, the fact that the loss is indirectly caused by negligence on the part of the assured does not exonerate the insurer from a loss by a peril insured against. But a different principle is applied to misconduct. "If misconduct (of the assured) is the efficient cause of the loss, the assurers are not liable" : *per* Lord CAMPBELL, C.J., in *Thompson v. Hopper* (1856), 6 El. & Bl. 937 ; 26 L. J. Q. B. 18. That is to say, if the misconduct, though not the *causa proxima*, is a *causa sine quâ non*, the assured is exonerated.

Where a policy was effected on living animals, the death of the animals caused by the agitation of the ship in a storm has been held a loss by perils of the sea : *Lawrence v. Aberdeen* (1821), 5 B. & Ald. 107 (14 R. C. 296). In this case the words added, "warranted free from mortality," were held not to create an exception, as they were construed merely to protect the underwriter against death from natural causes.

On the other hand, damage to perishable goods by delay owing to the voyage having been prolonged through bad weather, has been held not to be within the ordinary risk of "perils by the seas" : *Taylor v. Dunbar* (1869), L. R. 4 C. P. 206 ; *Pink v. Fleming* (1890), 25 Q. B. D. 396.

In *Powell v. Gudgeon* (1816), 5 M. & S. 431, where goods were insured against (*inter alia*) "perils of the seas," and the ship, having been disabled by a peril of the sea, put

into port, where the master, from the necessity (as alleged) of paying for the repairs of the ship, sold part of the goods, it was held that the loss of such goods was not a loss by perils of the seas, the proximate cause being, not the peril of the sea, but the inability of the master to find other means of paying for the repairs. This case was followed by the King's Bench and the Exchequer Chamber in *Sarguy v. Hobson* (1823, 1827), 2 B. & C. 7; 4 Bing. 131.

Under a plate-glass insurance policy, which excepted "fire, breakage during removal, alteration, or repair of premises," where a plate-glass window was broken by the pressure of a crowd assembled to look at a fire next door, the breakage was held not to be within the exception: *Marsden v. City & County Insur. Co.* (1865), L. R. 1 C. P. 232.

In the case of an ordinary insurance on ship against (*inter alia*) "capture," where the ship is captured and condemned for want of proper documents to prove nationality, as required by treaty between the country of the ship and the captors, the want of proper documents is the proximate cause of the loss, and the insured is not entitled to recover: *Bell v. Carstairs* (K. B. 1818), 14 East, 374; 14 R. C. 319.

Amongst the perils insured against in an ordinary policy of sea-insurance is "barratry," which is an unlawful act wilfully committed by the master or mariners contrary to their duty to their owners: *Earle v. Roveroft* (K. B. 1806), 8 East, 126 (14 R. C. 345). That "barratry" is distinct from an act of negligence is clearly shown by the case of *Grill v. General Iron Screw Colliery Co.*, cited at p. 352, *supra*. That was the case of an exception in the bill of lading where the difference became material. This would be less likely to happen in the case of an insurance policy where, if negligence was the ultimate cause, resulting in a loss by peril of the sea, the latter, as the proximate cause, would receive effect.

Where the cause of a loss is within the definition of barratry, it may yet be excluded by an exception of something which is the proximate cause of the loss, although itself the result of some barratrous act: *Cory v. Burr* (H. L.,

1883), 8 App. Cas. 393; 52 L. J. Q. B. 657. So in pleading it is correct to describe a loss as by "perils of the seas," if that is the proximate cause, although the peril was brought about by a barratrous act: *Heyman v. Parish* (1809), 2 Camp. 149 (11 R. R. 688).

Where it is proved that the ship sailed upon the voyage insured, and never arrived at the port of destination, this is *primâ facie* evidence of a loss by "perils of the seas": *Koster v. Reed* (K. B. 1826), 6 B. & C. 19 (14 R. C. 359).

8. ABANDONMENT AND TOTAL LOSS.

In general, a policy of insurance is a contract of indemnity, so that the insured, in case of a loss, can recover no more than the interest which he loses; but if the policy is valued—that is to say, the value of the whole interest declared in the policy—this is construed as a contract between the parties that the whole interest is of the value declared; and in the case of a total loss, and in the absence of fraud, this valuation is treated as conclusive between the insurer and insured.

A total loss occurs where, in consequence of the peril insured against, the subject-matter of the insurance has ceased to exist *in specie*; for instance, where a ship is wrecked so that the ship ceases to exist as a ship, and nothing remains but a mass of iron, wood, and cordage, then there is an actual total loss. But there is also a constructive total loss where the insured abandons the property, and the abandonment is accepted by the insurers; or where, at the time of the abandonment, the thing insured, or the insurer's property in it, has ceased to exist, although, by circumstances subsequently occurring, the subject of the insurance, or the insurer's property in the subject, may have been restored.

In all cases where a total loss is paid for by the insurer, he is entitled to what remains of the property; or, in case of the subject insured being restored *in specie*, or the property of the insured being revested, he is entitled to stand in place of the insured in respect of the property.

The capture of a ship by the enemy is a total loss, entitling the insured to abandon; and a subsequent recapture by a British ship (where the object of the voyage has been frustrated) does not disentitle the insured to abandon and claim for a total loss: *Goss v. Withers* (K. B. 1758), 2 Burr. 683 (1 R. C. 1). But if the facts constituting a total loss do not exist at the time of the notice of abandonment, the notice cannot convert a loss which is partial into a total loss: *Hamilton v. Mendez* (K. B. 1761), 2 Burr. 1198; *Bainbridge v. Neilson* (K. B. 1806), 10 East, 329 (1 R. C. 112).

Where an insured ship is so much damaged by a peril insured against as to be not worth repairing, there is a constructive total loss, and the insured may abandon and recover the value stated in the policy although it exceeds the estimated repairs. A similar principle applies to a policy on goods, the criterion being whether they can be forwarded to arrive in a merchantable state, and so to be worth the cost (not including the original freight) of forwarding them: *Allen v. Sugrue* (K. B. 1828), 8 B. & C. 561; *Irving v. Manning* (1848), 6 C. B. 391; *Farnworth v. Hyde* (Ex. Ch. from C. P. 1866), L. R. 2 C. P. 204; 36 L. J. C. P. 33 (1 R. C. 20).

To convert a constructive into an absolute total loss, notice of abandonment is necessary: *Fleming v. Smith* (H. L. 1846), 1 H. L. C. 513 (1 R. C. 37). The object of the notice is to enable the insurers to elect whether they will attempt anything in the way of saving the property. But if the circumstances are such that there is nothing to be done which a reasonable and prudent owner would do, then the notice is unnecessary, and the loss is to be treated as absolute without any notice: *Rankin v. Potter* (H. L. 1873), L. R. 6 H. L. 83 (1 R. C. 71).

9. GENERAL AVERAGE LOSS.

A *general average* loss is incurred where, under stress of extraordinary and unforeseen circumstances, a sacrifice of some part of the adventure is deliberately made for the

benefit of the rest. The loss which so arises is borne proportionately by all who are interested in the adventure.

On the other hand, losses incurred by reason of the master having done what was his plain duty as part of the adventure are not, by English law, accounted as general average. So it is the ordinary duty of the master to keep down water arising from a leak, and even if an unusual amount of coal is expended in working a donkey-engine for that purpose, the shipowner cannot claim that as general average: *Harrison v. Bank of Australasia* (1872), L. R. 7 Ex. 36. So where the sailing power of a clipper sailing-ship has been crippled by a peril of the sea, the expense of coal to complete the voyage under steam has been held not general average: *Wilson v. Bank of Victoria* (1867), L. R. 2 Q. B. 203. The distinction is illustrated by the case of *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro* (1887), 19 Q. B. D. 362, where the ship, having grounded, some general cargo was jettisoned to float the ship, and this was allowed as general average; but where, after the ship was floated, *specie* was taken out and sent by another ship, the expense of this was held not general average, as what was done was presumably intended, not for the general safety, but for the safety of the *specie* itself.

The foundation of the law of general average is commonly ascribed to the *Lex Rhodia de jactu*, which primarily applied to the simple case of jettison, *i.e.* sacrifice of cargo in order to lighten the ship, and so assist in bringing the ship and the rest of the cargo into safety. Even in jettison, however, English law distinguishes between deck cargo, which is presumably laden at the risk of being thrown overboard on the ship being in difficulties, and the ordinary cargo of the ship. But, by the custom of a particular trade, deck cargo may, if jettisoned, be the subject of general contribution: *Gould v. Oliver* (C. P. 1837), 4 Bing. N. C. 134 (14 R. C. 400).

The liability to contribute to general average has been sometimes said to be imposed by maritime law, and not to arise out of contract at all. But it is probably more correct

to say that the promise to contribute to general average is one implied by law in every contract for the carriage of goods. *Per* Lord BLACKBURN, in *Anderson v. Ocean S.S. Co.* (1884), 10 App. Cas. 107 (14 R. C. 409).

While the principle on which the claim to general average is founded is allowed according to all civilised legal systems, there is considerable variety in detail as to the cases and circumstances in which the claim is allowed. Where general average is claimed by the owner of the ship against cargo, the rule is that the claim is to be adjusted at the port of discharge according to the law of the place: *Simonds v. White* (K. B. 1824), 2 B. & C. 805 (14 R. C. 422). And a foreign judgment between owners of goods and ship is *primâ facie* evidence of such usage, in favour of insurers of the goods, who, on payment, are entitled to stand in place of the assured: *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481. See also *Dickenson v. Jardine* (C. P. 1868), L. R. 3 C. P. 639 (14 R. C. 431).

10. ADJUSTMENT OF LOSSES.

In case of an insurance on ship, where there is a partial loss in consequence of injury to the ship by a peril insured against, and the ship is actually repaired by the shipowner, he is entitled, as a general rule, to recover the sum properly expended in executing the necessary repairs, less the usual allowance, which (ordinarily in the case of an old ship) is one-third, by reason of the repair giving new for old. But if the owners have sold the ship unrepaired, the loss depends on the depreciation in the value of the ship, and not on the amount it would have cost to repair her: *Aitchison v. Lohre* (H. L. 1879), 4 App. Cas. 755; *Pitman v. Universal Marine Insur. Co.* (C. A. 1882), 9 Q. B. D. 192 (14 R. C. 462).

In the case of an open policy on goods, the rule is to take as the basis of valuation the prime cost, usually represented by the invoice price at the loading port *plus* the premium of insurance, expenses of loading, and commission. And where only part of the goods are damaged, the further rule is to

take the difference between the price of the sound and damaged goods at the port of delivery, and to apply this difference proportionally to the value ascertained on the above basis: *Usher v. Noble* (K. B. 1810) 12 East, 639 (14 R. C. 438).

By a general usage, the loss upon an open policy on freight is adjusted on the gross freight, although by the event the shipowner may have been saved expenses which he would have incurred before the freight could have been earned: *Palmer v. Blackburn* (C. P. 1822), 1 Bing. 61 (14 R. C. 486).

Where the insured has taken out several policies differently valued, and which have been only partially underwritten, and upon a total loss has received the amounts underwritten in some of those policies, he cannot, upon the remaining policy, recover more than the difference between the amount already received and the agreed value appearing upon that remaining policy: *Bruce v. Jones* (Ex. 1863), 1 H. & C. 769 (14 R. C. 489). This rule is a consequence of the principle of indemnity applied to the construction of the policy last had recourse to, and has the curious result that the whole sum recovered will be greater or less, according to whether recourse is first had to the policy with the less or greater valuation. Take, for instance, the case of a shipowner insured in one policy £2000 on ship valued at £4000, and in another policy £4000 on ship valued at £6000. If, on a total loss, he puts in suit his claim on the former policy first, he would get judgment on that policy for £2000, and then would be entitled to recover on the other policy £4000. But if he sued first on the latter policy and recovered £4000, he could get no more on the former policy, since the £4000 already recovered would exhaust the value declared on that policy.

In case of a double insurance, the insured may recover the whole against any of the insurers, and leave him to recover a rateable indemnity from the others: *Newby v. Reed* (1762), 1 Wm. Bl. 416 (14 R. C. 497).

11. RETURN OF PREMIUM.

If the risk has never been entered on, the result is that the basis of the contract has failed, and the premium may remain unpaid or will be repayable.

The risk is considered to have been entered on if there is, at the time of making the contract, an uncertainty in contemplation of both parties as to the safety of the adventure, although, in point of fact, the risk may at that time have been determined by the safe arrival of the ship and cargo: *Bradford v. Symondson* (C. A. 1881), 7 Q. B. D. 456; 50 L. J. Q. B. 582 (14 R. C. 521).

Where an action by the insured on the policy has failed by reason of a misrepresentation on his part which is held to be innocent, the insurer, in avoiding the policy, is put on terms of returning the premium on the ground that the risk has never been incurred: *Feise v. Parkinson* (C. P. 1812), 4 Taunt. 640 (14 R. C. 530). But where the policy is illegal as being made without interest, or by reason of the illegality of the adventure insured, no action will lie either for the sum insured or to recover a premium which has been paid: *Lowry v. Bourdieu* (1780), 2 Dougl. 468; *Vandyck v. Hewitt* (1800), 1 East, 96 (14 R. C. 533).

CHAPTER XLI.

AGENCY, ETC.

Following the arrangement on p. 337, *supra*, the next topic is—

(d) Agency, and other confidential relations (including duties and liabilities of trustees).

The contract of agency is made between two persons with the concurrent intention that a certain act, or acts of a certain class, shall be done by one of them (the agent), and that the other (the principal) shall have the benefit of and be held responsible for the act. To such a contract the law gives effect under the maxim, “Qui facit per

alium facit per se." In the case only of obligations by deed, the solemnity of the instrument is considered as making it essential that in order to bind the principal by a deed executed by the agent, the agent must be authorised by deed; but with this exception, and except where a personal signature is prescribed by statute or otherwise, the agent, who is merely authorised by parol, may bind his principal by signing a written instrument not being a deed: *Berkeley v. Hardy* (K. B. 1826), 5 B. & C. 355; *In re Whitley Partners, Ltd.* (C. A. 1886), 32 Ch. D. 337 (2 R. C. 273). And a deed executed by an agent and ratified by the principal will bind the principal for any purpose for which an instrument in writing, not being a deed, would be sufficient: *Hunter v. Parker* (1840), 7 M. & W. 344.

As between the principal and third parties, the doctrine of *holding out* is liberally applied. So that if A., having property or being liable to duties of a certain kind, ostensibly places B. in the management of that property, or delegates to him those duties, any third person affected by B.'s acts within the scope of such management or duty is entitled to assume that the act was with A.'s authority, and to hold him responsible accordingly: see *Chapleo v. Brunswick Benefit Building Society* (1880), 5 C. P. D. 331 (C. A. 1881), 6 Q. B. D. 696. And similarly, the neglect by B. of a duty in the course of the management is imputed to A. exactly as if A. had personally conducted the business.

Moreover, as between the principal and third parties, the authority of the principal will clothe the agent with a capacity of action, though the agent is himself irresponsible through some legal incapacity. So an infant may exercise a power over property by the authority of the owner, though he could not, by reason of legal incapacity, make a deed disposing of his own property: *In re D'Angibau, Andrews v. Andrews* (C. A. 1880), 15 Ch. D. 228.

But if A. commits the conduct of a business to B., that does not (in the absence of an express power to employ a sub-agent) enable B. to delegate the business to C. so as to make A. responsible for C.'s acts.

The act of an agent, although beyond the scope of the authority originally given him, may be ratified by the principal so as to be binding on him; that is, provided the act is within the capacity of the principal himself. This proviso is important in the case where the principal charged is a company incorporated under the Companies Acts. Any act purporting to bind a non-existent company, or any act beyond the scope of the memorandum of association, is incapable of being ratified by or made binding on the company: *In re Northumberland Avenue Hotel Co.* (C. A. 1883), 33 Ch. D. 16; *Asthury Railway Carriage, etc., Co., Ltd. v. Riche* (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185.

To make the act capable of ratification, the relation of principal and agent must exist at the time of the act. For instance, promoters of a company not yet formed cannot afterwards be treated as agents of the company; and any act of theirs before the formation of the company cannot be ratified so as to be binding on the company: *In re Northumberland Avenue Hotel Co.* (C. A. 1883), 33 Ch. D. 16 (2 R. C. 345).

An important distinction in mercantile agencies is made between what has been called a *general* agent and a *special* agent. The importance of the distinction consists in the scope of the authority which a third person, in dealing with an agent, may assume to have been given to the principal. Where the situation is such that the third party relies on the course of dealing inferred from a multitude of instances—whether the course of dealing is one between the parties concerned, or a general course of dealing between merchants in the like circumstances—and where the nature and extent of the authority is reasonably inferred from such a course of dealing, then the agent is said to be a general agent, and the principal is bound by his acts within the scope of the authority so inferred. Where there are no such circumstances as to raise this presumption of a general authority, the agent is said to be a *special* agent, and in this case the principal is only bound by the act of the agent within the

terms of his actual authority: *Whitehead v. Tuckett* (1812), 15 East, 400 (2 R. C. 357).

It will be readily seen that the principle on which the authority of a general agent is presumed is identical with the doctrine of *holding out* already referred to (at p. 385, *supra*). This doctrine of holding out has given rise to a fine distinction where the act is done inadvertently by the authorised agents of a company in the ordinary course of business, but with a result which is *ultra vires* of the company. In the case of *Balkis Consolidated Company, Ltd. v. Tomkinson* (1893), App. Cas. 396, where, in the course of business, a certificate of shares had been issued by which the authorised capital would have been exceeded, the company were held estopped from denying the title of the person to whom the certificate had been issued and were liable to compensate him in damages for the loss he had sustained in refusing to register a purchaser under a contract made by him on the footing of the ostensible title.

In the ordinary transactions of mercantile agents, the courts at one time were accustomed to give a somewhat narrow effect to the doctrine of holding out, and it was found that the convenience of mercantile transactions requires a more extensive interpretation of the principle. Hence has arisen the statutory extension of the principle by the series of Acts known as the Factors Acts, referred to at p. 254, *et seq.*, *supra*. The Factors Act, 1889 (52 & 53 Vict. c. 45), extended the principle to all cases that can be required by general mercantile convenience. But it is still clear that, in order to bring the Act into operation, there must be the relation of a mercantile agent. And it was decided by the House of Lords in *Hollins v. Fowler* (1875), L. R. 7 H. L. 757 (2 R. C. 409), that where a person obtains goods, or the documents of title to goods, from the owner by a fraud, without any relation of principal and agent being constituted between them, he cannot, either by the common law or under the Factors Acts, confer any title upon the purchaser of the goods.

Another consequence of the principle of *holding out* in

regard to agency is this: If a person, by an unqualified assertion of his being authorised by another to act as his agent, induces a third party to contract with him as such agent, the person so holding himself out as agent is answerable to the other contracting party upon an implied promise to warrant his authority: *Collen v. Wright* (1857, 1858), 7 E. & B. 301; 8 E. & B. 647. *In re National Coffee Palace Co., Ex parte Panmure* (C. A. 1883), 24 Ch. D. 367.

A presumption of authority not arising from *holding out* in the strict sense, but from the ordinary usages of society, has been the subject of some discussion. The question relates to a supposed presumption of authority in a wife to pledge the credit of her husband. The effect of modern decisions is to rest any such presumption upon the general principles of agency, and not to allow it to be carried further. If there is no holding out by a general course of dealing, the question whether the wife has authority to pledge her husband's credit, even for necessaries, is a question of fact. There may be a *primâ facie* presumption from the relationship: but the moment it is shown that the husband has forbidden his credit to be so used, there is an end of any such presumption: *Debenham v. Mellon* (H. L. 1880), 6 App. Cas. 24.

As between the principal and agent, the reciprocal duties are simple. The agent is bound, in regard to the principal, to execute his mandate with reasonable care and skill, having regard to the nature of the employment; and to account for all money or property received by him by reason of the employment. The agent is entitled, as against the principal, to be reimbursed for all payments, and to be supplied with funds to meet all liabilities incurred by reason of the employment. He is further entitled to a fair remuneration for his services, generally in the shape of a commission on the amount of the transaction. When the agent receives money or property by reason of the employment, he may retain out of such money or property the amount which he has paid or for which he has become liable, besides his commission or remuneration; and must strictly account for any further profit which he may handle out of the

transaction: see *Tyrrell v. Bank of London* and notes, 2 Ruling Cases 496, *et seq.* Upon the construction of a contract between principal and an agent acting for him at a distance, the rule has been laid down that "if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense of which it is equally capable": *per* Lord CHELMSFORD in *Ireland v. Livingstone* (1872), L. R. 5 H. L. 406, 416.

Of the various kinds of agents, the following are some of the most important:—

A *factor* is a general agent, having authority to sell, and to whom for that purpose is given the control of the bulk, whether by actual possession, or by having the goods shipped or warehoused at his disposal: *Baring v. Corrie* (1818), 2 B. & Ald. 137. He has an interest in the nature of property in the goods in security for the balance due to him by the principal on general account, and to the extent of securing this interest, his authority cannot without his consent be revoked by the principal. He is not the less a factor if, as between himself and the principal, his authority to sell is limited by special instructions; nor does he, by accepting such instructions, preclude himself from claiming against the principal his right in security for his general balance: *Stevens v. Biller* (C. A. 1883), 25 Ch. D. 31. As to third persons the presumable authority of the factor, being a general agent, may be extended by the principle of holding out already referred to; and his authority, as a "mercantile agent" within the meaning of the Factors Acts, already considered (p. 254, *et seq., supra*), is considerably enlarged by these Acts.

An *auctioneer* is an agent for the public sale of property, and, where the property consists of moveable chattels, has, generally speaking, the possession of the goods which he is employed to sell, and a special property by way of lien over the goods or their price for his commission. He makes the

contract for sale in his own name, and has implied authority, on delivery of the goods, to receive the price in cash. He acts as agent for the vendor alone, until a bargain is struck by the fall of his hammer ; but thereupon he has also the implied authority of the purchaser to sign a memorandum of the contract, so as to be binding under the Statute of Frauds. A produce broker, who is merely in possession of samples, is not an auctioneer in the usual sense of the word, although he may conduct his sales somewhat in the fashion of an auction. He has, speaking generally, no authority to make a contract in his own name or to receive payment.

The term *broker*, in its largest sense, is applied to a person who acts as the medium of negotiating and contracting any kind of bargain. Thus there are, besides *brokers for sale*, *ship-brokers*, who negotiate contracts of affreightment, *insurance brokers*, *stock-brokers*, etc.

A *broker for sale* is an agent to sell or purchase goods for another ; but he is not, like a factor or auctioneer, intrusted with the possession of the goods or the documents of title to them ; and he is not, according to the usual course of business, authorised to contract in his own name. But evidence may be admitted, by usage of a particular market or otherwise, that he has the authority so to contract : *Mollett v. Robinson* (1872), L. R. 7 C. P. 84. Where there is a price to be haggled for, he, obviously, cannot act as agent for both vendor and purchaser ; but where he has acted, in the first instance, for one (as the vendor), he may, in anything that remains to be done in clearly expressing the terms and making a binding contract on the terms agreed on, act as agent for both, Blackburn on Sale, at p. 82 (original edition). And an agent employed to sell or buy at a price with a limit, cannot, if he makes a bargain within the limit, take any benefit to himself (beyond his commission in fair proportion) out of the difference. Any practice or alleged usage to the contrary would be contrary to the fundamental principle of the law of agency : *De Bussche v. Alt* (C. A. 1878), 8 Ch. D. 286 ; 47 L. J. Ch. 381.

If a person sends an order to a broker engaged in a known

and established market, he gives authority to the broker to deal according to any well-established usage in that market, provided such usage is fair in itself, and does not change the essential character of the broker's employment as an agent, or of the contract purporting to be made by him on behalf of his principal: *Robinson v. Mollett* (1872), L. R. 7 H. L. 802, *per* Lord CHELMSFORD, at p. 836. Cf. *De Bussehe v. Alt* (C. A. 1878), 8 Ch. D. 286.

Contracts made by brokers are usually expressed by bought and sold notes delivered to the parties respectively. These notes are of various forms, which correspond, speaking generally, to one or other of the following types: Suppose A. B. is the seller, and C. D. the buyer. (a) In one form the sold note (*i.e.* the note delivered to the seller) begins, "Sold for A. B. to C. D.," and the bought note, "Bought for C. D. of A. B." Then follow the terms of the contract, description of goods, price, etc. Each note is signed by the broker, thus: "E. F., broker." The broker who sends a note in this form is not a contracting party, and can neither sue or be sued as a party to the contract: *Fairlie v. Fenton* (1870), L. R. 5 Ex. 169. (b) In a second form, the sold note begins, "Sold for A. B.," or sold for A. B. to our principals, and signed, "E. F., broker"—differing from the first form by the circumstance that the principal, C. D., is not disclosed. Where this form is used, it is competent to show that by the usage of the particular market the broker is liable to A. B. upon the contract, if the buyer elects to rely upon his credit: *Humphrey v. Dale* (1857), 7 E. & B. 266; *Dale v. Humphrey* (1858) E. B. & E. 1004. Where the sold note is in this form, the bought note may be in a similar form (*i.e.* not disclosing the name of the seller), or it may, without the difference being considered an essential variance, be in the former form, giving the names of both principals. Where a note is made in this second form (*e.g.* without disclosing the name of the seller), this note alone, without the production of the other, would not be a sufficient memorandum of the contract to satisfy the Statute of Frauds. (c) A third form of the bought and

sold notes is where the sold note (addressed to the seller) is in the form, "Sold to you by me, etc.," and is signed by the broker in his own name, without adding the word "broker." By a note in this form the broker makes himself a party to the contract, and he, as well as his principal, can sue and be sued upon it; nor is the other party bound to elect between the two, but may hold both responsible: *Calder v. Dobell* (1871), L. R. 6 C. P. 486 (2 R. C. 456).

The case of a broker—known to be such and understood by both parties to be acting as a broker—becoming liable on a contract in the form (c) above described, is quite different from the case—the usual case of a contract by a factor—where an agent contracts *as principal*, holding himself out, and being permitted by the principal to hold himself out, as the person alone responsible to the other party for fulfilment of the contract, and entitled to demand fulfilment from the other. This distinction becomes important in a question of set-off. Where the agent is dealing as a factor, being presumably authorised to hold himself out and deal with third persons as principal in his contracts with them, then the person dealing with him is entitled to set-off any amount already due to him from the factor against his liability on the contract. Whereas, in the case of a person dealing in the character of a broker, and known to be so dealing, the other party is not entitled to claim a set-off so as to interfere with the principal's right to payments under the contract: *Rabone v. Williams* (1785), 7 T. R. 360; *Baring v. Corrie* (1818), 2 B. & Ald. 137; *Cooke v. Eshelby* (H. L. 1887), 12 App. Cas. 271 (2 R. C. 390).

Insurance brokers are largely employed as common agents between the underwriters and the insured in marine policies. As agent for the insured, the broker effects the policy; and as agent for the underwriters, he receives the premium, and delivers and sometimes subscribes the policy. He has a lien upon the policy for the premium which he has paid or is liable to pay for it: *Fisher v. Smith*, 4 App. Cas. 1. As agent for the insured he has, by established usage in this country, authority to effect a policy in his own name on

behalf of his principal; and it is his duty, as agent for the insured, to state all material facts so that the policy is avoided if a material fact is concealed, even if the broker should have thought it immaterial.

Where the policy is left in the broker's hands, it has been held that it is within his general authority to adjust and receive payment *in money* of any return of premium or loss on a policy which he has effected. Whether he has authority to settle a loss by setting it off in his accounts with the underwriter against premiums due from him on other policies, has been a frequent subject of dispute. The usage at Lloyds which has given rise to this class of questions was given in evidence in *Bartlett v. Pentland* (1830), 10 B. & C. 760, 764, as follows: "When a policy is adjusted, payment is made at the expiration of a month, at which time the broker's account is credited with the amount of loss; and if the premiums due fall short of such amount, the balance is paid to the broker in cash. If, at the time of adjustment, the amount of premiums due from the broker to the underwriter exceeds the amount of the loss, it is usual for the underwriter to strike his name off the policy at that time; but the broker is not credited till the end of the month, it being considered that during the interval the assured may call for the money from the underwriter." In one case, *Stewart v. Aberdeen* (1838), 4 M. & W. 211, 228, the usage was allowed effect, so as to release the underwriter, upon evidence showing that the plaintiff had for a long period dealt upon the footing of the usage. But where the evidence has fallen short of proving the assent of the insured to a settlement of the accounts on the footing of the usage, the Courts have leant to the opinion that any such usage is unreasonable and inconsistent with the essential nature of the broker's employment: *Sweeting v. Pearce* (1860, 1861), 7 C. B. (N. S.) 449; 9 C. B. (N. S.) 534.

The contracts of *stock and share brokers* have been the subject of numerous decisions of the Courts, which have turned mainly on the usages of the London Stock Exchange. According to the principle stated at p. 390, *supra*, a person

in the business, then if X. Y. accepts the liability of this person by executing a transfer of the shares to him, and if the consideration is paid accordingly, then C. D. is exonerated from all liability in the business. The effect of the decisions is to hold that this is a reasonable usage, and that the jobber is exonerated, when once the contract is carried out between the ultimate principals. The above statement of the usage gives the transaction in its simplest form. In practice the matter is complicated by the circumstance that the parcel of shares dealt with may be split up by a series of transactions pending the account, but as the persons so dealing are all members of the Stock Exchange, and the usage provides means whereby the dealings of each may be traced, there is no real difficulty in carrying out the general result. Neither is any real complication introduced by the circumstance that in the intermediate transactions the price agreed on as the consideration may vary. The net result is that if the name or names are furnished and accepted, and the price is settled for with the first principal, X. Y., and he executes the transfer to the ultimate principal or principals whose names are furnished (in which transfer or transfers the consideration stated may vary from the consideration in the original contract—but with that X. Y. is not concerned), then there is a novation of the original contract, setting free all the intermediate dealers. In order to set free the jobber it is essential, as above stated, that the name furnished is that of one who has authorised his name to be given; and if the name furnished is that of an infant who is incapable of giving such authority, then there is no novation, and the original purchaser, C. D., is not released: *Nickalls v. Merry* (1875), L. R. 7 H. L. 530, where a long series of cases on the subject are reviewed.

The *master of a ship*—commonly the skipper or captain, and termed the *master* in his character as agent having authority to act for the shipowners—“has (according to the opinion of Lord ABINGER in *Arthur v. Barton* (1840), 6 M. & W. 138 (55 R. R. 542)) a general authority to make contracts and do all things necessary for the due and

proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required." So it has been decided in the Common Pleas that the presumption of authority entirely fails where the owner has, in the port where the ship is lying, an agent authorised and ready to supply the ship's requirements: *Gunn v. Roberts* (1874), L. R. 9 C. P. 331.

Generally, and in the ordinary course of things, the master is the agent for the shipowner only. With respect to the cargo, his duty is simply to fulfil, as agent for the shipowner, the contract to carry the cargo to its destination. But under exceptional circumstances he has an implied authority to act on behalf of the owners of the cargo. These circumstances may generally be referred to one or other of the following descriptions:—

Where the completion of the voyage contracted for is prevented by a cause excepted from the contract, the master, as the person in actual custody of the goods, may arrange with the consignees for delivery at an intermediate port, it being an implied term of such an arrangement that freight is payable *pro ratâ parte itineris*: *Christy v. Row* (1808), 1 Taunt. 300. And if, on putting in for repairs at an intermediate port, the goods are found to be, from sea damage, in such a state that they could not be carried on without great deterioration, it would be his duty, as a reasonable course, to deliver them up to the consignees demanding them and offering payment of freight *pro ratâ*: *Notara v. Henderson* (1870), L. R. 5 Q. B. 346.

And where, in the case of shipwreck or other emergency, which may render it necessary, in the interest of the owners of the cargo, that the goods should be dealt with in some other manner than by forwarding them in the ship to the port of destination, and where no express demand has been received from the consignees, it is the duty of the master to communicate with them and obtain their directions if

possible. Only in the case of an unforeseen and unprovided necessity, where no correspondence can be had with the owners of the goods within reasonable time—that is to say, where the necessity of action must arise before an answer can, in reasonable calculation, be expected—the master is justified in assuming, and is bound to assume, the character of agent for the owners of the goods. He is then bound to act for the best and to do with the cargo as a prudent owner would have done; and, as a correlative right, he is entitled to charge the owner with the expenses properly incurred in so doing: *Acator v. Burns*, L. R. 3 Ex. D. 282; *The Gratitude*, 3 C. Rob. 237; *The Buonaparte*, 3 Moo. P. C. 473; *Wilson v. Millar*, 2 Stark, 1; *Cargo ex Hamburg*, 2 Moo. P. C., N. S. 289; *The Lizzie*, L. R. 2 Adm. 254; *The Australasian, etc., Co. v. Morse*, L. R. 4 P. C. 222; *Cargo ex Argos*, L. R. 5 P. C. 134, 165; Campbell on Sale and Agency, pp. 618, 619 (2nd edit.).

Where the master is thus left to act upon his own judgment, he should be guided by the following rules:—

Primâ facie it is his duty, if possible, to carry on the goods in the original bottom, and to have the ship repaired for that purpose. If this is, in a mercantile sense, impracticable—that is to say, if the goods cannot be brought (in the original ship) to their destination in a marketable condition, and so as to be worth more than the cost of carriage (including the cost of unloading, drying, etc., and reshipping, but not including freight, unless for any excess of the freight in the substituted bottom over the original freight)—he may tranship the cargo, and he ought to do so rather than sell the goods. Only in the extreme case, where it is impracticable either to repair or to tranship, or to place the goods in safe-keeping, on the owners' account, until he can obtain their directions, the master may (because he must) sell the goods on behalf of their owners. Where they are sold in this way, and the title of the purchaser is contested, it lies upon him to prove the necessity; and where they are so sold, the shipowner has no claim for freight even *pro ratâ*. See *Underwood v.*

Robertson (1815), 4 Camp. 138; *Freeman v. East India Co.* (1822), 5 B. & Ald. 617; *The Australasian, etc., Co. v. Morse* (1872), L. R. 4 P. C. 222; *Atlantic Mutual Insur. Co. v. Huth* (1880), 16 Ch. D. 474; *Campbell on Sale and Agency*, p. 620.

Correlative with the master's duty to repair the ship, if practicable, is his power to hypothecate the ship and freight, and, if necessary, also the cargo, by a bottomry bond. It will appear, from what has been already said, that, as general agent for the shipowner, and in a place where money cannot be raised on the shipowner's credit, he has authority so to hypothecate the ship and freight. To make such an hypothecation good as to the cargo, it must further appear that the money could not be raised on the ship and freight only, and that, if practicable, a communication has been made to the owners of the cargo of the necessity and of the intention to hypothecate the goods. The effect of such a bond as to the cargo is to make the goods subject to contribution only after the ship and freight have been realised and the proceeds exhausted. In the same circumstances in which he would be entitled to hypothecate the cargo, the master would also be justified in selling part of the cargo, if by that means he can raise the money necessary to carry on the rest: *The Gratitude* (1801), 3 C. Rob. 240; *The Karnak* (1869), L. R. 2 P. C. 505; *The Onward* (1873), L. R. 4 Adm. 38. Where the master properly exercises his authority as agent for the owners of the cargo in hypothecating the goods, there is always, as between the shipowner and the owners of the cargo, an implied contract by the shipowner to indemnify them: *Duncan v. Benson, Benson v. Duncan* (1847, 1849), 1 Ex. 557; 3 Ex. 644; 18 L. J. Ex. 169.

CHAPTER XLII.

PARTNERSHIP.

FOLLOWING the arrangement on p. 337, *supra*, the next topic is—

(e) Partnership.

The contract of *partnership* is the source of obligation not only between the partners themselves, but also between the partners jointly and severally on the one part and a person contracting with the partnership firm on the other. The liability of the partnership firm to a third party depends on the law relating to agency, the authority of one partner to bind the others being either an actual authority within the intention of the partnership contract, or a general authority implied by the usual course of business in partnerships of the like character: *Dickinson v. Valpy* (1829), 10 B. & C. 128 (19 R. C. 423); Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 5-8.

Considering in the first place the obligations arising out of partnership, so as to bind the partnership firm to third parties, the following principles are established. For this purpose a partnership is constituted by the agreement between the persons, who are called partners, to show profits and losses: *Green v. Beesley* (1835), 2 Bing. N. C. 108; *Brett v. Beckwith* (1857), 26 L. J. Ch. 130 (19 R. C. 808). *Primâ facie* an agreement to share profits constitutes a partnership; but an agreement to share *net* profits does not necessarily constitute a partnership, and the *primâ facie* evidence constituted by sharing profits may be rebutted, if on the whole of the circumstances it clearly appears that the person alleged to be a partner has not expressly or by implication constituted the persons who ostensibly carry on the business as his agents: *Cox v. Hickman* (H. L. 1860), 8 H. L. C. 268; 30 L. J. C. P. 125 (19 R. C. 323); Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2.

Thus in a trading partnership where, as the business is usually carried on, credit is an essential element, and is

ordinarily taken in the form of bills of exchange, every partner has an implied authority, in the name of the firm, to draw, accept, and indorse bills of exchange. So where the business is of a kind where letters of credit to persons doing business abroad are usually employed, a partner, by giving such a letter of credit in the name of the firm, will bind all the partners. But no general authority will enable a creditor of a partner to hold the firm responsible upon an instrument signed by a partner for his own debt, and which the creditor knew to be so signed without the assent of the other partners. Such a transaction would be a fraud on the other partners, and, *ex hypothesi*, the creditor has been privy to it: *Shirreff v. Wilks* (1800), 1 East, 48. And there is no general or implied authority to give a letter of credit or guarantee for the debt of another in a home transaction: *Brettel v. Williams* (1849), 4 Ex. 623; 19 L. J. Ex. 121.

So a partner in a commercial firm has a general authority to purchase for the firm things of the kind usually dealt in by them (*Bond v. Gibson*, 1808, 1 Camp. 185), and to sell the property of the firm in the usual way; also to pledge the property of the partnership for money borrowed for the purposes of the business: *Ex parte Bonbonus* (1803), 8 Ves. 840. And probably the firm would be bound by his representation in the ordinary course of business that the money was borrowed for the purposes of the firm. But in a transaction out of the ordinary course of business, and if there was no fair ground for believing that the money was wanted for the purposes of the firm, the firm would not be bound: *Lloyd v. Freshfield* (1826), 2 C. & P. 325, 333. And where the management of the business is left by partners entirely in the hands of one as managing partner, there would, on the principle of holding out, be a strong presumption of authority on his part to deal with the partnership property by sale, pledge, or otherwise: *Reid v. Hollinshead* (1825), 4 B. & C. 867; *Ex parte Gellar* (1814), 1 Rose. 297.

It has been frequently stated not to be within the ordinary business of solicitors or attorneys as such to

receive money to be invested, generally and at the discretion of the solicitor, upon security; that has been said to be the business of a person technically called a *scrivener*: *Harman v. Johnson* (1853), 2 El. & Bl. 61; *Cleatter v. Twisden* (C. A. 1884), 28 Ch. D. 340. But, as it is not unfrequent for clients to entrust to their solicitors, especially to solicitors of the highest class, their money for investment, as well as the custody of their securities when invested, the circumstance may easily supply evidence of an actual authority. And it is, of course, only in the case of firms of solicitors of the highest reputation that the extensive frauds by one member, which have occasionally come to light, become possible. It seems clear at least that where money has been entrusted by a client to a partner of the firm for investment, and that partner has in the name of the firm represented that it has been invested accordingly, although in fact it has been misappropriated by the partner, the firm are liable upon that representation as within the scope of the partner's authority: *Moore v. Knight* (1891), 1 Ch. 547. And now the case appears to come within sect. 11 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which is as follows:—

“In the following cases, namely—

“(a) where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

“(b) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.”

The obligations of partners to one another depends primarily upon what is expressly contained in the partnership contract. But since, in many of such contracts, a great deal is left to be implied, it is necessary to state some of the leading principles which are so implied.

In the absence of agreement or evidence from which an

agreement may be inferred to the contrary, the shares of the partners are equal, and the partnership may be determined by any of the partners at any time without previous notice: *Peacock v. Peacock* (1809), 16 Ves. 49 (19 R. C. 548). Each partner is entitled to be indemnified out of the partnership assets for anything done by him in the ordinary and proper conduct of the business: Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2.

Whether the land on which the partnership business is carried on is partnership property is frequently a matter to be inferred from the circumstances and mode of carrying on the partnership business. Where the circumstances lead to this inference, the legal estate and interest in the land devolves according to the nature and tenure of the property and the general rules of law applicable to such property, but the person having the legal estate holds the property in trust for the partnership purposes; the equitable or beneficial interest is regarded as personal estate, and, in case of the decease of a partner and in the absence of anything in the partnership agreement to the contrary, devolves upon his executors or administrators. *Primâ facie* all property acquired in the course of the partnership business, or bought with money belonging to the firm, is partnership property: *Crawshay v. Maule* (1818), 1 Swanst. 530 (19 R. C. 467); Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 20-22. But where land is held by the partners as co-owners, and not as partnership property, the *primâ facie* inference is that further land purchased out of profits (although the profits are partnership property) is purchased as an addition to the property of the co-owners according to their original shares: Partnership Act, 1890, s. 20 (3) (a).

The right of a person who has entered into a partnership on the faith of representations made to him by the existing partners, to rescind the contract on discovering that the representations are essentially untrue, has given rise to difficult

(a) Presumably, in case of such a purchase, the co-owners must be charged with the purchase-money corresponding to their shares as co-owners.

questions. But the law is that this right of rescission exists in the contract of partnership like any other contract; and it is not competent to the partners who have been guilty of the misrepresentation to plead that entire restitution on the other side is impracticable merely because the business has become worthless through its own inherent vice: *Adam v. Newbigging* (H. L. 1888), 13 App. Cas. 308. The partner so entitled to restitution is, by the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 41, entitled to: (a) restitution, so far as possible, out of such partnership assets as remain after satisfying the partnership liabilities; (b) to stand in place of the creditors of the firm for any payments made by him in respect of the partnership liabilities; and (c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners: Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 25.

And although a power of expulsion of a partner is expressly given by the partnership articles, it is not validly exercised if it is shown to have been exercised unfairly, and without regard to the general interest of the partnership: *Blisset v. Daniel* (1853), 10 Hare 493 (19 R. C. 516).

A partner is not entitled to employ, for his own exclusive benefit, in any transaction within the scope of the partnership business, information or opportunities obtained by him in the course of transacting the partnership business, but is bound to account to the partnership for any benefit so obtained. On the other hand, he is not bound to account for the employment of such information or opportunities for purposes outside the scope of, and without detriment to, the partnership business: *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298; *Aas v. Benham* (1891), 2 Ch. 244 (19 R. C. 569); Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 29.

There is nothing formal in the agreement required to

constitute a partnership. Where an informal document containing instructions for a deed of partnership, but leaving details of the terms to be filled up in the formal deed contemplated, was initialled by the parties, and this was acted on with variations, the Court has considered that there was sufficient ground for a decree of specific performance of the agreement, and for an order for the execution of a formal instrument of partnership to carry out the terms of the original instrument, supplemented and varied so as substantially to carry out the agreement between the parties: *England v. Curling* (1844), 8 Beav. 129 (19 R. C. 598). But, as a general rule, the Court does not interfere in the management of a partnership, except for the purpose of dissolution: *Roberts v. Eberhardt* (1853), Kay, 148 (19 R. C. 598). And see *Scott v. Rayment* (1868), L. R. 7 Eq. 112.

The rights of the respective partners which arise upon the dissolution of a partnership are expressed in the Partnership Act, 1890 (53 & 54 Vict. c. 39), as follows:—

“Sect. 39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners of the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.”

In the absence of special provisions in the partnership contract, the good-will of a commercial partnership is regarded, on dissolution, as a saleable asset, to be realised for the benefit of all the partners, and this may be done either by an actual sale of the business as a going concern, or, in case of purchase by one or more of the partners, by an estimate of what the business would be worth if sold as a going concern: *Cooke v. Collingridge* (1822), Jacob, 607;

Smith v. Everett (1859), 27 Beav. 446 (19 R. C. 633). In a partnership between professional men, such as solicitors, there are not, as a general rule, any assets capable of being sold or valued as good-will: *Arundell v. Bell* (1883), 52 L. J. Ch. 537. See further as to good-will, *Trego v. Hunt* (H. L. 1895), 1896, App. Cas. 7, and p. 234, *supra*.

Where, after dissolution of partnership, the remaining partners employ in the business the capital of the former partnership, they are, in the absence of agreement to the contrary, liable to account to the deceased or outgoing partner or his representatives for the profits during such employment. But if the partnership articles contained an agreement for the purchase upon dissolution by the remaining partners of the share of the deceased or outgoing partner, they are liable to account only as purchasers of such share: *Crawshay v. Collins* (1808), 15 Ves. 218; *Vyse v. Foster* (H. L. 1874), L. R. 7 H. L. 318 (19 R. C. 682). And see the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 42.

The following section of this Act gives general rules for settling accounts, after a dissolution, as follows:—

“Sect. 44. In settling accounts between the partners, after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:—

“(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

“(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

- “1. In paying the debts and liabilities of the firm to persons who are not partners therein;
- “2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;
- “3. In paying to each partner rateably what is due from the firm to him in respect of capital.

“4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.”

CHAPTER XLIII.

INNOMINATE CONTRACTS.

FOLLOWING the arrangement on p. 337, *supra*, the next topic is—

(f) Innominate contracts (promise and consideration generally).

According to English law, to make a binding obligation by consensual (or simple) contract, *i.e.* otherwise than by the contracts comprised in clauses (1), (2), (3), in the divisions made on p. 336, *supra*, the *promise* by which the promisor is to be bound must be supported by a good *consideration* from the part of the promisee.

This principle is established by numerous cases from the oldest extant reports downwards. It has been summed up in the maxim deduced from the Roman Law: “*Ex nudo pacto non oritur actio.*” By the Roman Law *nudum pactum* was a promise unaccompanied by any legal solemnity, and not supported by “*causa.*” In some of the early cases this maxim is insisted on by way of protest against the doctrine of the canon law, which conferred a binding effect upon the promise itself, an effect which (to a limited extent) survives in the Scotch and some continental systems. The meaning of “*causa*” in the Roman Law was something given or performed on the other part. The tendency of modern authorities has been to give a somewhat wider meaning to “*consideration,*” so as to include any forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the promisee, at the request (express or implied) of the promisor: *Shadwell v. Shadwell* (1860), 9 C. B. (N. S.) 159 (6 R. C. 9). And see per LUSH, J. (delivering judgment of the majority), in *Currie v. Misa* (1875), L. R. 10 Ex. 153, 160. The rule so well established

in the old courts of law was followed in equity (*i.e.* in the Court of Chancery) under the maxim: "A court of equity does not interfere for volunteers," and the rule was even applied where the instrument sought to be enforced in equity was a deed under seal, on which there might, perhaps, have been a right of action for nominal damages at law. But if a trust were once constituted, there was no longer any question of consideration, but the beneficiary could enforce it against the trustee.

Where there is a compromise of claims, it is a sufficient consideration, moving from the person abandoning the claim, that it was honestly believed to exist, although it did not exist in fact: *Stapilton v. Stapilton* (1739), 1 Atk. 2; 2 White and Tudor, L. C.

There has been much discussion on the point whether a promise by one to reimburse another for an expense or service already incurred or rendered is supported by a consideration so as to make the promise enforceable. The criterion appears to be whether the expense was incurred or service rendered under such circumstances that a previous request might be presumed: *Eastwood v. Kenyon* (1840), 11 Ad. & El. 438 (6 R. C. 23). That presumption is, however, easily made. The dicta and decisions in the various cases are neatly summed up in the judgment of Lord Justice BOWEN in *In re Casey, Stewart v. Casey* (1892), 1 Ch., at p. 115:—"The fact (he says) of a past service raises an implication that at the time it was rendered it was to be paid for; and if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered."

CHAPTER XLIV.

OBLIGATIONS *QUASI EX CONTRACTU*.

FOLLOWING out the arrangement at p. 328, *supra*, the next subject is—

Obligations quasi ex contractu.

These are obligations arising from certain legal relations other than contract between the parties; but as they do not result from a wrongful action, and cannot be classed with obligations *ex maleficio* (or *ex delicto*), it is convenient to treat them as a class analogous to obligations by contract.

Examples given in Justinian's Institutes of Obligations *quasi ex contractu* are *negociorum gestio*, arising from the management, without a mandate, of the affairs of an absent person: *Tutela*, the relation between guardian and ward; the division of property held in common; the division of the inheritance between the heir and the family or legatees; *condictio indebiti*, the obligation to refund a payment made by mistake.

With the modern facilities for communication, the case is rare where the affairs of an absent person are left so unprovided for as to justify another person, without a mandate express or implied, to interfere. But there must frequently be cases where an agent acts, by necessity, upon an implied mandate beyond the power originally intended to be exercised by him. A relation of this kind has already been adverted to in the case of the master of a ship, who finds himself at a foreign port obliged to act on an unforeseen emergency (a).

On a principle similar to that of *negociorum gestio* in Roman law, rests the obligation arising out of salvage in the general maritime law.

A person who, by his own labour, preserves goods which the owners, or those entrusted with the care of them, have either abandoned or are unable to protect, is entitled, if the service has resulted in a benefit to the owners, to a

(a) See p. 396, *et seq.*, *supra*.

compensation for his trouble. To secure this compensation he is entitled to a lien upon, or right of retention of, the property saved until such compensation is made. This right of retention or lien has already been adverted to (p. 320, *supra*).

For a salvage service properly so called there is no claim to compensation, unless something is saved upon which it can be charged.

By the old maritime law as enforced by the court in its Admiralty jurisdiction there was no claim, of which the Court could take cognisance, for saving life. Such a claim was, however, introduced by the various Acts relating to merchant shipping. The enactment now in force is the 544th section of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which is as follows:—

“(1) Where services are rendered wholly or in part within British waters in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned.

“(2) Salvage in respect of the preservation of life when payable by the owners of the vessel shall be payable in priority to all other claims for salvage.

“(3) Where the vessel, cargo, and apparel are destroyed, or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Board of Trade may, in their discretion, award to the salvor, out of the mercantile marine fund, such sum as they think fit in whole or part satisfaction of any amount of salvage so left unpaid.”

There is still an essential difference between this statutory right of salvage with the statutory remedies, and the right of salvage as a lien upon the ship by the old maritime law, where the ship has been insured by a Lloyds' policy in the ordinary form without any express clause relating to the

statutory claim for life salvage. In such a case it has been decided that the shipowner, paying the statutory compensation, cannot recover it from the underwriters: *Nourse v. Liverpool, etc., Association* (C. A.), 1896, 2 Q. B. 16.

Where a service, in the nature of a salvage service, is performed at the request of the master of the ship in danger, and no benefit to the ship is derived from the service, there is no claim for salvage properly so called, nor is any lien for compensation constituted over the ship. But in such a case, whether the service is to life or property, there may be a claim upon the shipowner for compensation for work done under the express contract, which it is within the discretion of the master to make. But if the master has agreed (*e.g.* for saving life) for an exorbitant sum, although the service, so far as relates to saving life, was effectual, the compensation may be reduced to a sum which was fair under the circumstances: *The Medina* (1876), 1 P. D. 272, 2 P. D. 5; *The Benlariq* (1888), 14 P. D. 3; *The Lepanto* (1892), P. 122 (24 R. C. 576, *et seq.*).

There is, however, no authority in English law for the general principle apparently recognised by the *negociorum gestio* of the Roman law. The mere fact that a person has received a benefit through another, who has incurred expense or done work upon his property, is not in itself a ground for claiming remuneration, nor is it even a consideration to support a subsequent promise to pay for it, unless the expense were incurred under such circumstances that a previous request from the former person might be presumed: *Lampleigh v. Braithwait*, Sm. L. C.; *Eastwood v. Kenyon* (1840), 11 Ad. & El. 438 (6 R. C. 23). But the modern cases indicate a disposition, where possible, to regard such a request as implied by the circumstances, and to treat a subsequent promise as an admission supplying the want of positive evidence of a request: see the observations of Lord Justice BOWEN in *In re Casey, Stewart v. Casey* (1892), 1 Ch., at p. 115, cited at p. 407, *supra*. And, where a case of necessity arises for the possession of property, there is some authority for saying that a stranger may

interfere to the extent which is reasonably necessary without being treated as a wrongdoer: *Kirk v. Gregory* (1879), 1 Ex. D. 53 (25 R. C. 173).

The obligations arising from *tutela*, or the relation of guardian and ward, are mentioned in the Institutes as an instance of obligation *quasi ex contractu*. These have been already considered (at p. 87, *et seq.*) under the head of *status*. So the rights of persons interested in an inheritance, or under a trust, give rise to obligations which may be said to arise *quasi ex contractu*. But these obligations are merely incidental to the rights which are in effect rights of property, and have been already treated of.

The right of a co-parcener, by a writ of partition, to compel a partition of the property was always recognised by the common law courts, and by statutes in the reign of Henry VIII. the like rights were extended to joint-tenants and to tenants in common. The procedure of the common law courts was cumbrous, and could only be exercised where the parties held legal estates. A more convenient jurisdiction, with a more effective procedure, came to be exercised by the Court of Chancery; and by the statutes known as the Partition Acts, 1868 and 1876 (31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17), the Court was enabled to order a sale of the entirety, and distribution of the purchase-money where the Court considered this more beneficial in the general interest than a partition. If a sale was desired by the parties interested to the extent of one moiety (at least) of the estate, then the Court was directed to order a sale, unless the Court saw good reason to the contrary. The statutes contain equitable provisions in favour of those who wish to retain an interest in the property itself instead of a share of the purchase-money, either by allowing them to purchase, at a valuation, the shares of those wishing to sell, or by allowing them to bid at the sale.

The duty of trustees to the beneficiary under the trust, with whom they have no express contract, may also be said to arise *quasi ex contractu*. In the conduct of the trust estate they are bound to use the prudence and care which

persons of reasonable prudence use in the management of their own affairs: *Edmonds v. Peake* (1843), 7 Beav. 239. But, while a trustee does so conduct the trust affairs, he is not responsible for the misconduct or insolvency of an agent in good repute temporarily entrusted with money or securities in the ordinary course of business: *Speight v. Gaunt* (H. L. 1883), 9 App. Cas. 1; 53 L. J. Ch. 419.

Where a statutory body was incorporated for public purposes, with a right to take tolls for the use of their works, they were held entitled, under an obligation *quasi ex contractu*, to take care that those works were in a condition fit to be used by the persons liable to pay the tolls. So the Mersey Dock Trustees were held liable to ship-owners whose vessel was damaged by an obstruction consisting of an accumulation of mud, etc., negligently left by the employees of the Dock Trustees at the entrance of one of their docks: *Mersey Dock, etc., Trustees v. Gibbs* (H. L. 1866), L. R. 1 H. L. 93.

Another instance of a liability *quasi ex contractu* is that of a contributor to a company under the Companies Acts. In a sense this may be considered as a liability arising directly from the contract which the member enters into by his subscription to the memorandum of association, just as the liability of a partner in an ordinary contract of co-partnership. But the liability under the Companies Acts is defined and given effect to by the special provisions in the Acts relating to contributories. Under the Companies Acts certain statutory liabilities are imposed upon promoters and directors, and these, where not amounting to a liability *ex delicto* under the description of fraud, may be regarded as arising *quasi ex contractu*.

Trustees who, in accordance with their trust, are holders of property on which there is a liability, are entitled to have made good to them, out of the trust estate, the amount which may lawfully be claimed from them in respect of that liability. This principle was applied by the Scotch courts in many cases arising out of the failure of the Western Bank of Scotland: see *Cunningham v. Montgomerie* (1879),

Robinson v. Fraser's Trustees (1880), 6 Rettie 1333, and 7 Rettie 707. The same principle was given effect to by the Master of the Rolls (Sir G. JESSEL) in an unreported case of *Isaac v. King* (July, 1877). The part ownership of a toll footbridge near Bath was vested in trustees in accordance with their trust. The bridge was sufficient to bear the ordinary traffic, but on an occasion, when there was a cattle show on the neighbouring premises, the bridge broke down under the unusual pressure of the crowd going over, and many persons were damaged. The owners of the property, who, by receiving the tolls, had impliedly invited the passengers to use the bridge, were unquestionably liable, if not on an absolute warranty of safety, at least upon an implied warranty of strict care (*a*). Towards these persons their least duty would have been to have a careful survey made, and to have taken care that no more persons were admitted to the bridge at any one time than the bridge could safely bear. But, as between the trustees and their beneficiaries, there was no reason to charge the latter with more than ordinary care, or, in other words, the trustees would have been only responsible for personal negligence, which, as the circumstance of the bridge becoming overcrowded was, in fact, unforeseen, could not be imputed to the trustees. They were therefore held entitled to have the claims by the strangers against them made good by the beneficiaries out of the trust fund.

Notwithstanding the common law rule that trustees are only liable to the beneficiaries for negligence, properly so called, there were many cases decided by courts of equity which seemed to bear hardly on trustees; and it became usual in a well-considered trust deed to insert a clause for restricting their liability. The general effect of such a clause is now embodied in the Trustee Act, 1893 (56 & 57 Vict. c. 53), which, by sect. 24, enacts as follows:—“A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him,

(*a*) See under the head of Tort, p. 415, *post*.

notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default, and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers."

The obligation, which was the ground of the *condictio indebiti* of the Roman law, that is to say the obligation to refund a payment made by mistake, is well established in English law. It is, in English law, based on the ground that, as there was no consideration for the payment, there was no contract under which the payee was entitled to receive or retain the money. The principle is largely modified by the rule that if the money was received by the payee in good faith, and his position is altered before the mistake is discovered and the demand for payment made, he is not bound to refund: *Skyring v. Greenwood* (K. B. 1825), 4 B. & C. 281; *Cocks v. Masterman* (K. B. 1829), 9 B. & C. 902; *London & Plate Bank v. Bank of Liverpool*, 1896, 1 Q. B. 7 (21 R. C. 60, *et seq.*).

The principle on which the common law courts enforced the repayment of money paid without consideration was applied by courts of equity to a somewhat wider class of subjects, including restitution generally against the effect of a mistake. So that not only could money paid under a mistake (or without consideration) be recovered, but an error in framing a deed or written instrument could be rectified, and the instrument reformed according to the true intention of parties. This could not be done upon mere parol evidence of one of the parties, and the suggestion of mistake, if not admitted, required some corroborative evidence in writing.

To the class of obligations arising *quasi ex contractu* may also be referred the implied warranty of authority, by which

a person who enters into a contract expressly describing himself as agent for a named principal has been held to be bound to warrant his authority: *Collen v. Wright* (1857, 1858), 7 ELL. & BL. 301; 8 ELL. & BL. 647; *In re National Coffee Co., Ex parte Panmure* (C. A. 1883), 24 Ch. D. 367 (2 R. C. 434).

To the same class may be referred the rule that the person acting upon a forged instrument, as well as the person requesting another to act upon it (both being innocent), is liable as if he had warranted the genuineness of the instrument: *Sheffield Corporation v. Barclay*, 1905, A. C. 392.

Lastly, to the class of obligations *quasi ex contractu* may be referred the obligation arising out of a judgment (*res judicata*). Whatever be the nature of the original obligation out of which the action has arisen, the judgment creates a *novation*; that is, a new obligation. And this obligation may be said to arise *quasi ex contractu* by reason of the implied contract involved in the *litis-contestatio*. In a civil action in England the *litis-contestatio* is represented by the "appearance" of the defendant. The principle is obscured under the modern rule, which admits of judgment "in default of appearance;" but that is only a rule of convenience, which does not do away with the consequences of the fiction that the *litis-contestatio* is a contract between the parties to abide by the judgment.

CHAPTER XLV.

OBLIGATIONS *EX DELICTO* (TORTS).

FOLLOWING the arrangement on p. 328, *supra*, the next subject is—

(B) OBLIGATIONS *EX DELICTO* (TORTS).

These arise by an injury, otherwise than by the mere breach of an obligation incurred by reason of contract, or arising *quasi ex contractu*.

The obligations, the breach of which constitutes such an injury, may be classed as follows:—

1. The obligation absolute to avoid causing damage to another.
2. The obligation to take care so as to avoid causing damage to another.
3. The obligation to refrain from intentional acts which cause damage to another.

1. To the first of these classes (appropriately described by the expression, “*Sic utere tuo ut alienum non lædas*”) belongs the obligation incumbent on every person to maintain and manage his property so that it is not dangerous to the public or to individuals. As to the public safety, the neglect of this duty may be the subject of an indictment. As to the liability to individuals, the principle is illustrated by the case where a person, going along a highway under a railway bridge, was injured by a brick falling from a pilaster at the side of the bridge. This was held to be, as against the railway company, *prima facie* evidence that the premises of the railway company were dangerously in want of repair: *Kearney v. L. B. & S. C. Ry. Co.* (1870, 1871), L. R. 5 Q. B. 411; L. R. 6 Q. B. 759, (19 R. C. 1). In the judgment of the Exchequer Chamber, something is indeed said suggesting the *want of care* in not having the premises surveyed from time to time. But it is hardly consistent with the judgment to suppose that if the premises had been recently surveyed and reported safe, that would have excused the defendants if the premises were, in fact, dangerous to passers-by.

On a similar principle stands the obligation of a person who harbours a dangerous animal (presumably known by him to be dangerous); he is bound at his peril to secure the animal so that it does no mischief. This obligation is absolute; and if the animal escapes and does mischief according to its nature, he is responsible: *May v. Burdett* (1846), 9 Q. B. 101 (3 R. C. 108). The natural propensities of the domestic dog have occasioned many legal disputes; but the presumption, by the English common

law, has long been settled that the dog is a tame animal, and that the owner is not responsible unless the dog in question is by disposition ferocious, and that this ferocious character is known to the owner. The Court even went so far as to presume in favour of the dog that it was not in his nature to worry sheep; and the House of Lords (Lords BROUGHAM and CRANWORTH) extended the presumption to Scotland; so that for a brief period, to use the language of a Scotch judge (Lord COCKBURN), every dog became entitled to "one worry." An Act was soon afterwards passed for Scotland declaring it unnecessary in an action against the owner of a dog to prove a previous propensity to injure sheep or cattle: the Dogs (Scotland) Act, 1863 (26 & 27 Vict. c. 100). A similar Act was afterwards passed for England: the Dogs Act, 1865 (28 & 29 Vict. c. 60). These Acts are now formally repealed, and the provisions (with an extended definition of the word "cattle") re-enacted by the Dogs Act, 1906 (6 Edw. VII. c. 32).

So, also, if a person collects on his premises noxious matter, the nature of which, if it overflows or spreads vapour over a neighbour's land, is to cause a nuisance, he must prevent this at his peril: *Tenant v. Goldwin*, 1 Salk. 21, 360, 2 Ld. Raym. 1089; *Aldred's Case* (1609), 9 Co. Rep. 576; *Humphries v. Cousins* (1877), 2 C. P. D. 239; *Ballard v. Tomlinson* (C. A. 1885), 29 Ch. D. 115.

So if a person, without statutory authority, does what naturally involves danger to the public or neighbours, he acts at his peril if another is injured by the natural consequence of the act. For instance, if he drives an engine emitting dangerous sparks, he is answerable for all the consequences which those sparks may cause by setting fire to the property of another, whether immediately adjoining, or at a distance from, the place where the sparks were emitted: *Jones v. Festiniog Ry. Co.* (1868), L. R. 3 Q. B. 733; 37 L. J. Q. B. 214.

Where a landowner for his own purposes makes an artificial reservoir for the storage of water, he is also under a duty which requires explanation by the cases.

In the case of *Rylands v. Fletcher* (H. L. 1868), L. R. 3 H. L. 330, the principle of the cases relating to the accumulation of filth, or the harbouring of a noxious beast, is applied by the House of Lords (Lord CAIRNS, L.C., and Lord CRANWORTH) to the responsibility of one who makes a reservoir for storing water on his own land. The principle is broadly stated by Lord CRANWORTH as follows: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage" (L. R. 3 H. L. 340). In this statement Lord CRANWORTH adopts what was said by Mr. Justice BLACKBURN in delivering the judgment of the Exchequer Chambers in the same case (L. R. 1 Ex. 265). But the statement of the principle in this judgment, as delivered by Mr. Justice BLACKBURN, was more guarded: "We think," he said, "that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient" (L. R. 1 Ex. p. 279).

The case of *Fletcher v. Rylands* (in the appeal called *Rylands v. Fletcher*) arose out of damage from water escaping from the defendant's reservoir and flooding the plaintiff's mine. The defendant had employed a competent engineer and competent contractors, by whom the site was selected and the reservoirs planned and contracted. Upon this site there were some old shafts which had got filled up with earth, and these shafts, although the fact was unsuspected by all persons concerned in making the reservoir, communicated with old underground workings leading into

the plaintiff's mine. The construction of the reservoir had been completed, and as soon as it was partly filled, one of the shafts gave way under the pressure, and the water burst through and did the mischief complained of.

The principle laid down so broadly by the Lords in *Rylands v. Fletcher* is narrowed by the judgment of the Court of Appeal in *Nichols v. Marsland* (1876), 2 Ex.D.1. In this case it appeared that the reservoir was, in fact, constructed so as to be sufficient when full, under ordinary circumstances, to contain the water, and that all reasonable care had been taken by the defendant, but that after an unusual fall of rain, and by a flood of such dimensions as to be properly called the act of God, or *vis major*, the reservoir overflowed, the banks gave way, and damage was done by the escape of the water. The Court held that the construction of a reservoir and filling it with water for storage is not in itself an unlawful act, and that if the work is properly done so that the reservoir is, in fact, sufficient, under any circumstances that may be reasonably anticipated, to contain the water, and only gives way through the action of a flood so great that it could not be reasonably anticipated—in other words, through what has been called the “Act of God,” or *vis major*—the defendant is exonerated.

In truth, the analogy between making an artificial reservoir for water, and the accumulation of filth or harbouring a mischievous animal, was, at least by the *dicta* in *Rylands v. Fletcher*, pushed too far, and further than the facts of the case required. The accumulation of filth or harbouring a mischievous animal to the danger of neighbours cannot be said to be a lawful act, and is only allowed to go unpunished on condition that no harm is done. If the thing escapes and does harm, it is quite in the spirit of the old cases to conceive the damage as relating back to the original act, on the so-called principle of “trespass *ab initio*” (*Scott v. Shepherd*, Smith's L. Ca.). When once it is admitted that the storing of water in a properly constructed reservoir is in itself a lawful act, the principle ceases to apply.

A third case relating to the liability of a person

constructing and maintaining a reservoir of water is *Box v. Jubb* (1879), 4 Ex. D. 76. There the overflow of the defendant's reservoir was caused by the acts of other persons over whom he had no control, namely, the combined effect of the emptying of a reservoir above, and the obstruction of a water-course below. The defendant was held not liable.

On the question: What is the duty of a person who, without statutory authority, constructs and maintains a reservoir of water not necessary for the ordinary cultivation of his land? the answers suggested by the above cases, taken in order, are the following:—

(a) He is bound, at all events, to restrain the water from escaping so as to do damage; or,

(b) He is bound to restrain the water, at all events, excepting the act of God (*vis major*) or the King's enemies; or,

(c) He is under an absolute duty to construct and maintain a reservoir capable of holding the water under all circumstances reasonably to be anticipated; but, if he has done this, he is not liable for *vis major*, or for the acts of other persons over whom he has no control.

The first answer (a) appears to be that intended by the Lords who decided *Rylands v. Fletcher*; but, as already shown, the duty suggested is wider than that required by the circumstances of the case.

The second answer (b) is the effect of the decision in *Rylands v. Fletcher*, modified so as to be consistent with the decision of the Court of Appeal in *Nichols v. Marsland*.

The third answer (c) is consistent with the actual decision in all three cases, *Rylands v. Fletcher*, *Nichols v. Marsland*, and *Box v. Jubb*.

Of the general principle that a person in doing a lawful act is excused by *vis major*, or the act of God, a good illustration is furnished by the decision of the House of Lords in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 437. The Commissioners were a statutory corporation under an Act incorporating The Harbour Docks and Piers Clauses Act, 1847 (10 Vict. c. 27). By the 74th section of this Act a liability was imposed upon shipowners by whose

ships, or persons in charge of them, the piers or works should be damaged. A ship, navigated without negligence, was caught in a violent storm, and in attempting to make the harbour was driven aground near the pier belonging to the Commissioners. The master and crew, in order to save their lives, were obliged to abandon the ship. As the tide rose the ship floated, and was driven by the storm against the pier, so as to cause damage. It was held by the House of Lords that the statutory liability must be construed as subject to the common law exception of inevitable accident.

As further instances of obligations which are absolute, excepting inevitable accidents, may be mentioned the obligation between adjoining occupiers to maintain sufficient fences: *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274; and particularly where such an obligation is imposed upon a railway or other public company as accommodation works for the protection of the adjoining landowner: *Besant v. Great Western Ry. Co.* (1860), 8 C. B. (N. S.) 368; *Child v. Hearn* (1874), L. R. 9 Ex. 176.

Sometimes, by Act of Parliament, active duties are expressly imposed upon certain classes of persons, such as ship-owners, mill-owners, colliery proprietors, where such statute is of a strictly public character, and the duties are intended as reasonable precautions for the health or safety of a class of persons having to do with those upon whom the duties are imposed. The failure to perform such duty gives a right of action to the person suffering consequential damage of the kind intended to be guarded against: *Britton v. Great Western Cotton Co.* (1872), L. R. 7 Ex. 130; *Baddeley v. Earl Granville* (1887), 19 Q. B. D. 423 (17 R. C. 212). The Courts have, however, refused to extend the principle to the duties imposed upon such bodies as water companies, so as to give all persons served by them a right of action as insurers against fire: *Atkinson v. Newcastle, etc., Waterworks Co.* (1877), 2 Ex. D. 441; and in *Johnston v. Consumers Gas Co. of Toronto*, 1898, A. C. 447.

Another familiar instance in this country of an obligation which is absolute, excepting the act of God or the King's

enemies, is the obligation of the sheriff duly to execute and return the writ intrusted to him. So that if the writ is for the apprehension and custody of a debtor who escapes, he can be excused only by the act of God or the King's enemies: *Dennis v. Whetham* (1874), L. R. 9 Q. B. 345; *Allen v. Carter* (1870), L. R. 5 C. P. 414; cf. *Lloyd v. Harrison* (1866), L. R. 1 Q. B. 502. This degree of responsibility applies only between the sheriff and the person who employs him. For instance, his liability to the owner of goods seized under an execution is only that of an ordinary bailee entrusted with goods for sale.

2. The obligation to take care, so as to avoid causing damage to another, embraces a very large class of objects. It may be said generally that some such duty of taking care lies upon all persons engaged in their ordinary occupation.

But especially, where a person is engaged in a lawful act, which, if not conducted with skill and care, is attended with danger to others, he is under the duty not only personally to exercise care, but, so far as relates to strangers, to warrant the necessary care and skill on the part of all taking part in the work. By here using the word *strangers* it is meant to exclude persons who, by reason of a special relation to the person doing the acts in question, or to the business which is being carried on, are presumed to have undertaken the risks incident to the business, including want of care on the part of the person acting, or of those acting under his orders. So far as it affects the relation of master and servant, this presumption, as it exists by English case law, and as it has been modified by statute, has already been adverted to at p. 92, *et seq.*, *supra*.

Again, the person who invites another, on a matter of business, to come upon his premises, is held bound to warrant due care in having his premises in a safe condition for the purpose: *Indermaur v. Dames* (1866-7), L. R. 1 C. P. 274; 2 C. P. 311; *Smith v. London and St. Katherine's Dock Co.* (1868), L. R. 3 C. P. 326; *Heaven v. Pender* (C. A. 1883), 11 Q. B. D. 503. But where the relation between the parties is one of mere courtesy, the guest takes the risk of

the state of the premises of his host, the latter being only bound to warn him of anything in the nature of a trap upon the premises: *Southcote v. Stanley* (1856), 1 H. & N. 241 (19 R. C. 60).

A special duty of care is required from persons who justify on the ground of statutory authority an act which would otherwise be injurious. For instance, where a company is incorporated for a public purpose, with statutory powers for the use of which no liability to compensation is provided, they are not responsible for damage necessarily caused by the use of their statutory powers: *Hammersmith Ry. Co. v. Brand* (H. L. 1869), L. R. 4 H. L. 171; nor for accidents occurring through the use of their statutory powers in a manner necessary for their undertaking: *Vaughan v. Taff Vale Ry. Co.* (Ex. Ch. 1860), 5 H. & N. 679; but they are bound to take all reasonable precautions, including the use of any statutory powers they possess, by which danger may be effectually guarded against: *Geddes v. Proprietors of Bann Reservoir* (H. L. 1878), 3 App. Cas. 430; *Hawthorn Corporation v. Kannuluik*, 1906, A. C. 105. And where *vis major*, or the act of God, is pleaded as an excuse for damage done by an act authorised by statute, the defendant must show that he duly performed a statutory requirement prescribed for the purpose of avoiding damage: *Nitro-phosphate, etc., Co. v. London and St. Katherine's Dock Co.* (C. A. 1877), 9 Ch. D. 503 (1 R. C. 276). See also *Mersey Dock Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; *Reg. v. Williams* (1884), 9 App. Cas. 418; 53 L. J. P. C. 64.

So where, under statutory authority, a railway crosses a public road at a level, the immunity of the company for running trains which would be dangerous to the public using the road depends on their complying with the statutory precautions. And it has been held that the leaving open of one of the gates by which the road is ordinarily closed is an intimation to the public that the road is safe, so as to justify a jury in finding a verdict for a passenger who has been injured by a train in using the crossing: *Stapley v. L. B. & S. C. Ry. Co.* (1865), L. R.

1 Ex. 21; *Wanless v. N. E. Ry. Co.* (1871), L. R. 6 Q. B. 481; L. R. 7 H. L. 12; *Lunt v. L. & N. W. Ry. Co.* (1866), L. R. 1 Q. B. 277.

These are some of the circumstances in which a special degree of care is required by law; and a warranty of the use of such care is implied by the circumstances. In such cases the person on whom the duty was primarily incumbent cannot excuse himself by showing that he had put the business in the hands of a contractor, however competent: *Tarry v. Ashton* (1876), 1 Q. B. D. 314.

In the ordinary case where a person is liable for simple negligence, some positive evidence of negligence must be given to raise a *prima facie* case of liability: *Cotton v. Wood* (1850), 8 C. B. 568; *The Marpesia* (1872), L. R. 4 P. C. at p. 212. On this principle it has been held that where a horse, harnessed and attended to in the usual manner, bolts and causes an accident, this alone is not sufficient evidence of negligence to support an action for the damage: *Hammach v. White* (1862), 11 C. B. N. S. 583; *Holmes v. Mather* (1875), L. R. 10 Ex. 261; *Manzoni v. Douglas* (1880), 6 Q. B. D. 145.

Also in cases where positive negligence is in question, a person is, generally speaking, not responsible for the acts of an independent contractor, to whom the doing of some work has been committed; but he is responsible for the acts of a servant who is guilty of negligence in the course of his employment. What is negligence in the course of employment is a question on which fine distinctions have been taken. Compare *Whatman v. Pearson* (1868), L. R. 3 C. P. 422, and *Storey v. Ashton* (1869), L. R. 4 Q. B. 476. In the former case (*Whatman v. Pearson*) a carter, employed by a contractor, under orders that, while ceasing work in the dinner-hour, he should stand by his horse and cart, went home to his dinner about a quarter of a mile from his place of work and left his cart standing by the door of his house—the horse having his bridle off and a nosebag on, but nobody to look after him. The horse ran away with the cart and smashed the plaintiff's railings. The contractor, his master, was held liable. In the latter case (*Storey v. Ashton*) a

carman, the servant of a wine-merchant, after delivering wine and receiving some empty bottles, which he ought to have brought back at once to his master's office, went off with his cart in quite another direction on an errand with which his master had nothing to do, and negligently ran over the plaintiff. The case was distinguished on the ground that here the carman had started "on a new and independent journey, which had nothing to do with his employment;" and the master was held not liable.

So the owners of a ship are liable for damage caused by the negligence of the master acting within the general scope of his authority: *The Thetis* (1869), L. R. 2 A. & E. 365. But the owners are not responsible for the fault of a qualified pilot acting in charge of the ship within any district where the employment of a qualified pilot is compulsory by law: Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 633; *General Steam Navigation Co. v. British, etc., Co.* (1869), L. R. 4 Ex. 238 (19 R. C. 208).

The exception, by common law, of the responsibility of the master to a servant for the acts of fellow-servants, and the statutory limitations imposed on that exception, have already been discussed in considering the relation of master and servant as a *status* (p. 92, *et seq.*).

3. An intentional act, the natural consequence of which is to cause, and which does in fact cause, injury to another, creates a liability *ex delicto*. The principle is too obvious to require any detailed explanation.

But only by gradual steps, and under the modern reformed procedure, it has become possible to state or apply the principle generally to all sorts of injuries. The remedies by English law have been built up by forms of action—precedent on precedent—and the substantive obligations imposed by law are still influenced by the old forms.

The typical and most ancient form of action to enforce a liability *ex delicto* was that instituted by a writ of trespass, which became applied as well to assaults on the person as to invasions of property. Where the injury was a personal assault, the writ charged the defendant with trespass *vi et*

armis, and for this it was sufficient that the defendant had shaken his fist or lifted his cane against the plaintiff so as to cause him disturbance. If he had actually struck the plaintiff, this was an assault and battery ; and this, again, might be aggravated by wounding, and, still further, by *mayhem*, or depriving the plaintiff of a member, so as to lessen his power of defence in fighting.

The principle established under the writ of trespass because enlarged by writs framed by analogy, either by such slight variations as were allowed by the common practice of the office whence the writs issued, or by writs framed in pursuance of the Statute of Westminster the Second (13 Edw. I. c. 24), which extended the authority of the clerks in Chancery to frame a new writ in a like case with a precedent already found. The actions so brought under the statute were commonly spoken of as actions of trespass *on the case*. The right of action was, by an early usage, extended to an assault and battery upon the plaintiff's servant, but this required an allegation of special damage such as "*per quod servitium amisit*." At one time it appears to have been doubted whether an action of this latter kind was an action of trespass or of trespass *on the case* ; but it was ultimately decided that the plaintiff had the option to bring *trespass* for the injury *per quod servitium amisit* ; or *case* for the consequential damage : *Chamberlain v. Hazlewood* (1839), 5 M. & W. 515. The only remaining consequence of the distinction between the two forms of action is that, under the Statute of Limitations (21 Jac. I. c. 18), the period of limitations for an action of trespass is four years, and for an action on the case six years.

The action for trespass *per quod servitium amisit* came to be applied to an injury by seduction of the plaintiff's servant. Curiously enough, the legal injury to a parent by the seduction of a daughter is still supposed to depend on the service (even although almost nominal) rendered by the daughter while living in the family of the parent. And, in regard to a daughter who has gone out to service or employment elsewhere, the parent has no such legal remedy.

The action for seduction of, or criminal connection with, the plaintiff's wife, had no doubt also its origin in the notion of service. The recovery of damages in such an action was long regarded as a necessary preliminary to the divorce which was obtained by a quasi-legislative proceeding in the House of Lords. The claim for damages is now prosecuted against the co-respondent, along with the proceedings for divorce, under the Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), now assigned by the Judicature Acts to the Probate and Divorce, etc., Division of the High Court.

Under the head of trespass was included the action for false imprisonment. This included any unlawful restraint or detention of a person against his will, and if it occurred by an abuse of legal machinery without the intervention of the order of a judge who had discretion in the matter, it was still a trespass. Now, since the Debtors Act, 1869 (32 & 33 Vict. c. 62), the power of commitment for debt can only be exercised by the authority of a judicial order, and there is little scope left for the abuse of legal machinery by private action. To protect the subject against imprisonment without lawful warrant there is an ancient remedy provided by writ of *habeas corpus*; and this has been improved and made more effective by statutes, particularly by the Habeas Corpus Act, 1679 (31 Car. II. c. 2), which was passed in order to prevent delays and evasions by the Crown authorities in the effective operation of the writ.

Every person who is a witness of a breach of the peace is justified in himself arresting one of the offenders, and it is then his duty either to bring him before a magistrate or to deliver him to a constable for that purpose. A private person is not justified in arresting on mere information of a breach of the peace; but a constable may arrest on the information of bystanders. But if a treason or felony has been committed, it is lawful for any one to arrest and take before the magistrate a person who is suspected on reasonable and probable grounds of being the guilty one. There are various statutes under which owners of property or others may be justified in arresting and bringing before

a magistrate persons offending against the Act; such, for instance, as the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), which, by sects. 103, 104, authorises servants of the company to detain persons attempting to defraud the company of his fare.

Trespass to land consists in any unlawful intrusion upon the right of the person who is in possession. The possession *facto et animo* is all that is required to give a title to a plaintiff in such an action; and it can never avail the defendant to show that the right and title to possess is in a third person.

Where the ownership or right to the possession of the land is claimed by a plaintiff against the person actually in possession, the proceedings until recently took the form of an action of ejectment, which itself replaced the older real actions, of which the most important was that by writ of right. The issue on a writ of right could only be tried by combat, and it was to avoid this and other inconveniences of the old real actions that the proceeding by ejectment was invented. This proceeded upon a supposed lease, entry, and ouster, which came to be merely fictitious; but the proceedings led up to an issue on which the question of right was tried, and the successful claimant ultimately obtained a writ entitling him to possession.

By the modern practice an action is brought for a declaration of title and recovery of possession. The principles upon which the trial takes place are (a) that the actual possession is *primâ facie* evidence of seisin in fee, and (b) that the plaintiff must succeed by the strength of his own title, and not by the weakness of the title of the defendant.

Again, an injury may consist in the wilful disturbance of such rights as franchises, rights of common, rights of way or of ancient light, or other incorporeal hereditaments. Such an injury might be made the ground of an action at law; and, if the disturbance was continuous, may be restrained by injunction, that is to say, an order of the Court to discontinue the disturbance under pain of being committed to

prison for contempt of Court. This remedy by injunction was at one time peculiar to the Court of Chancery; but it was extended to the courts of common law by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 79), though it was very sparingly applied by the judges of those courts.

So an injury may consist of the wilful infringement of such rights as copyright, or patent, or trade-mark, and these may be restrained by injunction as well as visited with damages.

Waste, or the destruction of or damage to the reversion, by a person having a limited interest, such as a tenant for life, was, according to the former practice, restrained by injunction from the Court of Chancery. Now it may be restrained by injunction or visited with damages in an ordinary action.

Intentional injuries in respect of corporeal chattels were formerly distinguished, according to the form of remedy, by an action of trespass, of trover, of detinue, or of replevin.

Trespass in respect of a chattel consisted of wrongfully interfering with the plaintiff's possession.

Where the gist of the action was to complain of the wrongful withholding of the possession, the action was called an action of detinue.

Where the injury consisted of a wrongful transfer of, or transaction purporting to transfer or affect the title to the property in, a chattel of which the defendant was already in possession, the action was called an action of trover. This was based on the fiction that the defendant had found the thing, and unlawfully converted (*i.e.* disposed of or injuriously affected) the right of property. The action might be brought in trover for a chattel which the defendant had obtained by a trespass, but by bringing the action in trover the plaintiff was supposed to waive the original trespass.

There is a summary remedy, regulated by statute, now by the County Courts Act, 1888 (51 & 52 Vict. c. 43, ss. 133-137), called an action of replevin, by which goods taken by distress, or cattle impounded *damage feasant*, may, on certain conditions, be recovered pending the decision as to the right. The plaintiff commences his action in the

County Court of the district where the goods were seized (sect. 134); but the action may, at the instance of the defendant, be removed into the High Court by writ of *certiorari*.

The action of replevin is still a peculiar remedy standing on the statutory enactments. The remedies for trespass, trover, and detinue, although the terms are still used to indicate briefly the nature of the wrong for which redress is sought, are no longer appropriated to any technical form of action. All that is required is to set forth clearly the nature of the injury and the redress which is sought for it.

Besides the remedies by resort to the Courts, it has always been, and still is, lawful for every person to defend himself and his property from external violence; and the right extends to the reciprocal defence of such as stand in the relation of husband and wife, parent and child, master and servant. It is lawful for the purpose of such defence to repel force by force, and the breach of the peace which may happen is chargeable upon him only who began the affray. But this right only extends to the use of such force as is necessary for defence and prevention of injury, and must not be carried beyond the reasonable bounds of the occasion. For instance, if a man attacks me with his fists or a cane, I should not be justified in retaliating with a lethal weapon.

So if another has wrongfully taken possession of my goods, I may, if I can do so peaceably, retake and hold possession of them without recourse to an action.

Another remedy which a person may use without resort to the courts is the abatement or removal of a nuisance. So that if a new gate, or lock upon a gate, has been erected or fixed across a path by which I have a right of way, I may remove it, at least if I can do so without a breach of the peace. And if the way be a public highway, any of the King's subjects may remove it. So if a new fence is erected so as to obstruct a right of common to which I am entitled for the beasts levant and couchant on my ancient tenement, I may remove it, so that I do so without riot and without unnecessary damage to the materials.

The remedy of a landlord by distress of chattels for his rent, and of the owner of land by distress or impounding of cattle *damage feasant* on his tenement, is another remedy of which a person may avail himself by his own act, without resort to the Court. To remove the distress the owner of the chattels or beasts must resort to the proceeding by replevin above mentioned.

Defamation is a wilful wrong by published writing or speech calculated to injure a person in his reputation. Where the injurious matter is published in writing it is called a *libel*; where by words spoken, it is *slander*.

Libel, besides being a private injury, is also regarded as a criminal offence. Apart from this, there is the difference that slander as a rule requires proof of special damage, whereas libel does not. But there are many slanders which do not require proof of special damage. For instance, to accuse a person of a criminal offence (punishable by imprisonment, and not merely by a fine) does not require proof of special damage to make it actionable. Again, to say that a person is suffering from a contagious disease, such as would naturally lead to the person being shunned by his fellows, is actionable *per se*. And so is an accusation calculated to injure a person in his trade, profession, or business.

A person is liable as the publisher of a libel, if he has communicated libellous matter to another person requesting or intending that the latter should publish it. But the seller of a newspaper in the ordinary course of his business is not liable if, without negligence, he is ignorant of its containing libellous matter: *Parker v. Prescott* (1869), L. R. 4 Ex. 169; 38 L. J. Ex. 105; *Emmens v. Pottle* (1885), 16 Q. B. D. 354; 55 L. J. Q. B. 51 (9 R. C. 16).

The proprietor of a newspaper is civilly liable for all defamatory matter contained in it: *Shepherd v. Whitaker* (1875), L. R. 10 C. P. 502.

The liability *prima facie* constituted by a libel or slander may be met by the defence of privilege.

Some occasions are so absolutely privileged that proof

of actual malice will not support the action for libel or slander. Such are—

(1) Proceedings in either of the Houses of Parliament. The privilege is not extended to a publication outside the House, without the authority of an order of the House, of any libellous matter contained in a speech. And it was held by the Court of Queen's Bench in *Stockdale v. Hansard* (1839), 9 Ad. & El. 1, that even the order of the House did not justify the publication; but that decision was overridden by the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9). The publication, however, in a newspaper of a fair report of the speeches in Parliament enjoys a qualified privilege; that is to say, if it is a *bonâ fide* report for the instruction of the public, and without malice: *Wason v. Walter* (1868), L. R. 4 Q. B. 73.

(2) Proceedings in a Court of Justice. No action lies against a judge of a superior court of justice for anything said or done by him while sitting as a judge, even if malice be proved: *Floyd v. Barker* (1608), 12 Co. Rep. 24; *Anderson v. Gorrie* (C. A. 1894), 1895, 1 Q. B. 668. Nor does any action lie against an advocate, whether barrister or solicitor, for any words spoken by him in conducting the cause of his client, even if they were irrelevant, and spoken maliciously and without reasonable cause: *Munster v. Lamb* (C. A. 1883), 11 Q. B. D. 588 (7 R. C. 714).

The privilege of a judge of an inferior court is limited by the condition that what he said or did was in a case within the jurisdiction of his Court, or that he had reason to believe a state of facts which gave him jurisdiction: *Calder v. Halkett* (1839), 3 Moo. P. C. 28; *Houlden v. Smith* (1850), 14 Q. B. 841.

The testimony of a witness in a judicial proceeding is absolutely privileged: *Trotman v. Dunn* (1815), 4 Camp. 211; *Seaman v. Netherclift* (1876), 2 C. P. D. 53. So is the observation of a juror: *Rex v. Skinner* (1772), Lofft. 55.

(3) The proceedings of a naval or military court are absolutely privileged: *Dawkins v. Lord Rokeby* (H. L. 1875), L. R. 7 H. L. 744 (9 R. C. 39). So are communications as

to matters of State made by an officer of State to another in course of his official duty: *Chatterton v. Secretary of State for India* (1895), 2 Q. B. 189; 64 L. J. Q. B. 677.

There is also a qualified privilege of communications made under circumstances of which the following are examples:—

A communication fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his own interest is concerned, is privileged to the effect that no action can, in the absence of proof of malice, be maintained in respect of the statements contained in the communication: *Toogood v. Spyring* (1834), 1 Cr. M. & R. 181; *Hemmings v. Gasson* (1858), 9 R. C. 55, and notes.

So where a register is kept in compliance with an Act of Parliament, a person is entitled, for the purpose of warning the public or tradesmen about to give credit, to publish a copy of the register: *Searles v. Scarlett* (1892), 2 Q. B. 56; 61 L. J. Q. B. 573.

By sect. 3 of the Libel Law Amendment Act, 1888 (51 & 52 Vict. c. 64), “a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority, shall, if published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.” By sect. 4 the privilege is extended to reports in various proceedings of a public character, unless it shall be proved that such a publication was made maliciously.

A communication affecting a government official and addressed to a proper person is likewise privileged. So is any communication of such a nature that the person making it can be fairly said to have an interest in making it, and the person to whom it is addressed has a corresponding interest in having it made: *per* Lord ESHER, M.R., in *Hunt v. G. N. Ry. Co.* (1891), 2 Q. B. at p. 191. This, of course, means privileged in the sense that actual malice would take the case out of the privilege.

In the same sense, statements made in answer to inquiries as to the character of a servant are privileged.

In the same sense, fair and *bonâ fide* comment on a matter of public interest is privileged: *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; *Merivale v. Carson* (1887), 80 Q. B. D. 275. Compare *Thomas v. Bradbury, Agnew & Co.* (1906), 2 K. B. 627 (C.A.).

By the Libel Acts, 1843 and 1845 (6 & 7 Vict. c. 96, s. 2, and 8 & 9 Vict. c. 75, s. 2), when a libel is published in a newspaper without malice and without gross negligence, insertion of an apology at the earliest opportunity, the defendant paying money into Court by way of amends, is made a good defence.

By the common law, apart from statute, a slander may be justified by proofs of its being accurately true. Where the defamation consisted of a charge of a general nature, the defendant, in pleading justification (according to the system of pleading before the Judicature Acts), was required to state the particular instances in which he intended to support the charge. And, under the modern system of pleading, the plaintiff is entitled to full particulars embodying those matters which formerly must have been contained in the plea.

Previously to the Libel Act, 1843 (6 & 7 Vict. c. 96), commonly called Lord Campbell's Act, a libel could not be justified by proof of its truth. But by sect. 6 of this Act it was enacted that "on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for

defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published."

Malicious prosecution, or the wilful abuse of legal proceedings to injure or harass a person, is another ground of action arising *ex delicto*.

In former times, where a person alleging himself to be creditor had the power of arresting his debtor upon what was called *mesne process*, the abuse of this process might have been the ground of an action for malicious prosecution. Under the modern procedure it can seldom happen that a civil action can furnish a ground for malicious prosecution; for it must be assumed that justice will eventually be done in the action itself; and the penalty of having to pay the costs is regarded as sufficient compensation for the annoyance that the defendant may suffer in the ordinary case of a vexatious action. But where a criminal charge has been preferred, upon which the accused may be liable to imprisonment, the case is different; and this may be made the ground of an action for malicious prosecution. To succeed in the action the plaintiff must prove first that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; and fourthly, that it was malicious.

Lastly, *fraud or deceit* is a ground of action *ex delicto*. Where a person, with a view to influence the conduct of another, wilfully leads him into a false belief, and this latter person acts accordingly to his hurt, the act is said to have been induced by fraud; and the former is liable to make reparation. The remedy was pursued in the old common law courts by what was called an action of deceit, and there was a corresponding remedy given by a court of equity. Now the remedy is obtained by an action in the High Court, exercising the jurisdiction of both the courts of common law and equity. To constitute the fraud, it is

not essential that the defendant was, or expected to be, benefited by the deceit; but it is essential that he should have been guilty of wilful falsehood—or, what comes to the same thing, of reckless disregard of truth—in the representation made: *Pasley v. Freeman* (K. B. 1789), 3 T. R. 51; *Derry v. Peek* (H. L. 1889), 14 App. Cas. 337 (12 R. C. 235). And, to recover in an action on the ground of an act which is, by statute, to be deemed “fraudulent,” the plaintiff must show that he has suffered damage from the act: *Macleay v. Tait*, 1906, A. C. 24.

PART IV.—*CIVIL PROCEDURE.*

CHAPTER XLVI.

SUPERIOR AND OTHER COURTS OF CIVIL JURISDICTION BEFORE THE JUDICATURE ACTS.

CIVIL Procedure in the English Superior Courts is now regulated by the Judicature Acts of 1873–1891, and the Rules of Court made under the authority of those Acts, which constitute, in effect, a Code of Civil Procedure. To understand the working of this Code, it is necessary to give a brief account of the organisation and jurisdiction of the Courts as they existed before the Judicature Acts.

Previously to the consolidation of the Courts effected by these Acts, the great mass of litigation was carried on before the Superior Courts of Common Law at Westminster, namely, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. Each of these Courts had its own special history and its own special jurisdiction. The jurisdiction of each of the Courts was gradually extended, until, in most of the ordinary classes of actions, they came to have a concurrent jurisdiction. The Court of Queen's Bench, however, continued to have a special and generally exclusive power over the issue of what were called the "prærogative writs," such as: (1) *Mandamus*, by which persons having official duties to perform were compelled to perform them; (2) *Quo warranto*, by which persons were forbidden illegally to assume official functions; (3) *Prohibition*, by which inferior Courts, or persons having powers to adjudicate upon matters of a certain class, are restrained from entertaining questions or acting outside

their proper sphere; and (4) *Certiorari*, by which the proceedings were removed from the inferior into a superior Court. The Court of Exchequer continued to have an exclusive jurisdiction in regard to customs and matters of the revenue; and also, for a considerable time, had, in concurrence with the High Court of Chancery, a power to administer "Equity;" that is to say, to give relief on grounds of complaint not recognised by the Courts of Common Law in their ordinary practice, but where equity and good conscience called for a remedy.

The three Superior Courts of Common Law at Westminster were "Courts of Record," and were branches of the ancient Court formerly called "*Curia Regis*." The proceedings of these Courts form an unbroken series of precedents going back to the twelfth century. The description of a Court as a "Court of Record" carries with it the important summary power to order imprisonment for contempt of Court.

The "writ" or summons directed to the sheriff, by which the defendant is required to appear to answer to the complaint of the plaintiff, was, by the ancient practice, issued, not by the Courts of Common Law, but by the Chancery. Already, in the twelfth century (*a*), there were a great number of these writs in common use, and these were, without further authority, issued at the instance of any plaintiff, who was prepared to set forth his complaint in the usual form. These writs, and the practice established by the usage, formed the ground of the "common law" of England. It is probable that at one time each of these forms of writ was specially authorised by the king, with the advice of his "Great Council" (*i.e.* the Parliament). Writs in a new form were from time to time issued from the Chancery, by the express order of the Parliament upon a bill brought in for that purpose. It must have been within the scope of the business of the Chancery Office, within certain limits, to adapt the form of a writ to the special occasion; but, however this may have been in

(a) See Preface to Glanville, "*De Legibus*."

theory, the practice was to adhere rigidly to the accustomed forms.

By a statute passed in the year 1285, called the "Statute of Westminster the Second" (13 Edw. I. c. 24), it is, *inter alia*, enacted that whensoever it shall happen in the Chancery that in one case there is found a writ, and in a like case falling under the same law and requiring a like remedy [is found none], the Clerks of the Chancery shall agree in making the writ; or the plaintiff may adjourn it until the next Parliament, when a writ is to be framed with consent of men learned in the law, "so that it may not happen in future that the Court should long fail to minister justice to complainants." If this statute had been followed out in a liberal sense, as well in Chancery as by the learned authorities in Parliament, the Courts of Common Law at Westminster might have assumed all the necessary functions of a court of civil jurisdiction. But the traditions of these Courts were not favourable to so wide an extension of their powers. The Courts of Common Law were long engaged in a contest with the so-called Spiritual Courts (or Ecclesiastical Courts), who had arrogated to themselves, as "courts of conscience," a jurisdiction to determine upon secular matters, such as claims of debt. The Courts of Common Law were not inclined, themselves, to act as courts of conscience. And although, by the operation of the Statute of Westminster, a considerable variety of new forms of writs found their way into the Common Law Courts, it was left to the Lord Chancellors to assume, by virtue of their high office, the jurisdiction which the Courts of Common Law had declined. The form of proceeding is stated by Blackstone to have been devised by John Waltham, who was Bishop of Salisbury and Chancellor to King Richard II., and who invented a writ for the execution of a use (or trust) of land by which the feoffee, who had the paramount title (so-called the *legal* title, because the Courts of Law refused to recognise any other), was made accountable to the beneficiary. This writ, by a strained interpretation of the Statute of Westminster the Second, was made returnable

to the Chancery itself. The jurisdiction thus assumed in regard to uses or trusts was gradually extended to other subjects, and, however arbitrary in its commencement, the "equitable" jurisdiction of the Court of Chancery grew into a large and important branch of judicial business.

The Court of Chancery, in concurrence with the Common Law Courts, exercised jurisdiction in complaints grounded on deceit. The Court of Chancery restrained by injunction a plaintiff who had a clear right at law—for example, by a bill of exchange—from prosecuting his action against his debtor contrary to a collateral agreement which, so to speak, bound the "conscience" of the legal creditor. The Court of Chancery similarly intervened to restrain persons from various threatened invasions of rights, where a Court of Law would only have granted a remedy in damages, after an infringement of right had actually taken place. The Court of Chancery decided in all matters of trust, and even claimed the special office of executing trusts. It administered the effects of a deceased person, as well when the deceased had left a will, as in cases of intestacy. The Court of Chancery rectified or annulled written documents, and ordered the specific performance of contracts. The same Court took upon itself an exclusive jurisdiction in questions arising out of partnership, in the redemption and foreclosure of mortgages, and in the raising of money charged upon land. The same Court assisted a creditor, who had got judgment for his debt, to enforce it by "equitable execution;" that is to say, by appointing a Receiver to take possession of property which could not be got at by the methods of execution allowed by the Common Law Courts. The Court of Chancery exercised a statutory jurisdiction as a Court of Appeal in matters of bankruptcy, and as a Court of Justice for the winding up of joint-stock companies; and was the sole authority for administering the purchase-money under Acts of Parliament which sanctioned the compulsory purchase of land for works such as railways, etc. In regard to the division of property held by several persons as tenants in common,

the Court of Chancery exercised an ancient jurisdiction, which, in the year 1868, was extended by statute to the sale and division of the proceeds of land held in common. Finally, the Lord Chancellor exercised guardianship over, and the control of the property of, orphan minors; and this became part of the business of the High Court of Chancery.

To complete this brief sketch of the Courts of Civil Jurisdiction, which, until 1875, shared the functions of a High Court of Justice, three others must be mentioned, namely, the "High Court of Admiralty," the "Court of Probate," and the "Court for Divorce and Matrimonial Causes." These names generally indicate the purposes which they fulfilled.

The High Court of Admiralty is said to have been instituted by Edward III. In 1861, by the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), its jurisdiction was enlarged and its procedure improved. Its special object was to deal with claims arising from wrongs committed on the high seas; it entertained claims for the repair and outfit of ships which lay under arrest; it could enforce claims for food and other necessities supplied for the use of the ship, and claims arising out of breach of the contract of affreightment, unless it was proved that the ship belonged to owners domiciled in England. It decided in all differences and disputes between co-owners of an English ship registered in an English port, and upon all claims for salvage and hire which may have been earned on board the ship. The competence of the Court was grounded upon the arrest of the ship or its cargo until security was given that the plaintiff's claim would be satisfied.

The right of awarding a ship as prize was formerly exercised by judges of the Court of Admiralty in virtue of a special commission issued *ad hoc*, under the Great Seal, at the beginning of a war; but in 1864 this jurisdiction was permanently assigned by the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), to the High Court of Admiralty.

The Court of Probate was set up in 1857 by the Court

of Probate Act, 1857 (20 & 21 Vict. c. 77), with a jurisdiction which superseded the Ecclesiastical Courts in some of their functions, comprising (1) the decision upon the legality of wills; (2) the conferring upon a person as executor (confirming the intention of the will), or as administrator (where no such intention has been found), the complete legal title to the personal estate of the deceased.

The Court for Divorce and Matrimonial Causes was instituted also in 1857 by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), with a jurisdiction which superseded (with enlarged powers) the jurisdiction of the Ecclesiastical Courts in matrimonial causes, and consisted in pronouncing decrees of separation and deciding upon questions relating to the status and *modus vivendi* of married folk as such. The jurisdiction of the new Court extended to the dissolution of marriage on the ground of adultery committed by a wife, or of adultery with cruelty, or certain aggravated forms of matrimonial infidelity, committed by the husband. Previously to this Act, the divorce *a vinculo* could only be obtained by elaborate and most expensive proceedings, culminating in what was equivalent to a private Act of Parliament on a bill in the House of Lords (*a*). The Act of 1857 is amended and the jurisdiction of the Court further extended by various later Acts (*b*) (21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; 31 & 32 Vict. c. 77).

The three Superior Courts of Common Law and the High Court of Chancery, together with the three Courts of special jurisdiction last mentioned, thus shared the functions of a Superior Court of Justice in civil matters. And, owing to the great popularity of the Courts of Common Law at Westminster, and to the circumstance that they decided in the first instance even in matters of

(*a*) Where the domicile is in Ireland, this still remains the only means of divorce *a vinculo*. In Scotland, the Court of Session has an old jurisdiction to pronounce a divorce *a vinculo* for adultery or desertion; and this, whether the husband or the wife is the person aggrieved.

(*b*) The Matrimonial Causes Acts, 1857 to 1878. Collective short title by 59 & 60 Vict. c. 14.

small value, and that the Court of Queen's Bench had the power of drawing to itself all cases which were depending in a lower Court; the Superior Courts were able to deal with the great mass of civil litigation throughout England. Only in questions of equity which had to be brought into the Court of Chancery, the proceedings were always expensive; and where a small estate was put into Chancery (or, in technical language, "administered by and under the direction of the Court"), the whole was inevitably swallowed up in costs.

From the decisions made in the first instance by all the above-mentioned Courts an appeal lay either to the Court itself by a re-hearing, or to Courts variously constituted for the purpose of appeals. And from every final judgment there lay an appeal, in the last resort, to the House of Lords, except from the judgments of the Admiralty Court, from which the appeal was made to His Majesty in Council, and was, of course, remitted to the Judicial Committee of the Privy Council.

As to the Inferior Courts, a very brief account is sufficient for the present purpose. Blackstone enumerates several whose jurisdictions, even at his time, were well-nigh obsolete. Of these, it is only necessary to mention the old County Court—the Court of the Sheriff, or *vice-comes*. This is interesting to the student of English law for two reasons—first, because in Scotland this Court has maintained its existence, with an important jurisdiction, unimpaired by the activity of the Superior Courts; and secondly, because in England these Courts, after their authority had dwindled and become practically extinct, were (in 1846, 9 & 10 Vict. c. 95) revived and reorganised in order to decide in trifling matters; and by later legislation received more important powers. The County Courts now exercise jurisdiction in personal actions up to the value of £100 (1903, 3 Edw. VII. c. 42), and in certain classes of equitable claims, relating to property, up to £500: the County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 67). They have jurisdiction to grant probate or administration of estates up to £200: the

Court of Probate Act, 1858 (21 & 22 Vict. c. 95, ss. 10 and 12); and have jurisdiction in various marine actions up to £300: the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71); the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51). In all these cases the jurisdiction is concurrent with that of the High Court and subject to an appeal to the Court of Appeal. They possess also important powers in relation to bankruptcy: Bankruptcy Act, 1883 (46 & 47 Vict. c. 52); and, in relation to mines in Cornwall, under the Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45).

The Court of the Lord Mayor in the City of London has jurisdiction extending over the City of London, grounded on "foreign attachment." That is to say—the plaintiff puts an arrest on a claim of the defendant against a person (called the "garnishee") having a place of business in the City, and by this means compels the defendant to submit himself to the jurisdiction.

Besides these Inferior Courts, there are Courts having a local or special jurisdiction, and having within the limits of their jurisdiction some of the characters of a Superior Court. Such is the Court of Chaucery of the County Palatine of Lancaster. This is an ancient Court, to some extent remodelled by the Court of Chancery of Lancaster Act, 1850 (13 & 14 Vict. c. 43), and left untouched by the Judicature Acts, except that the powers of the Court of Appeal in Chancery of the County Palatine were transferred to the Court of Appeal established by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 18). The procedure of the Court of Chancery of the County Palatine is now regulated by rules made by the same authority as the rules for the Supreme Court. See the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23, s. 6).

There is a similar local jurisdiction still exercised by the Court of Chancery of the County Palatine of Durham, and the procedure of that Court is assimilated by the Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), to that of the High Court.

The Chancellor's Court of the University of Oxford has, under its charters confirmed by the Act of 13 Eliz. c. 29, an exclusive civil jurisdiction, unlimited in amount, and extending to all causes of action not relating to freehold, in which a resident member of the University is concerned. The University, accordingly, claims "conusance" of all actions which, in contravention of its privilege, are commenced elsewhere: *Ginnett v. Whittingham* (1886), 16 Q. B. D. 769.

This Court of civil jurisdiction sits regularly. Its judge must be a barrister of five years' standing. Its registrar and practitioners must be solicitors. Its Rules and Orders are sanctioned by the Rules Committee. Its jurisdiction in probate was taken away in 1857.

The law administered by this Court is, by the Oxford University Act, 1854 (17 & 18 Vict. c. 81, s. 45), no longer the civil law, but the common law. The appeal from it lies, since 1894, to the High Court of Judicature.

A brief reference may here be made to the residuary jurisdiction of the Ecclesiastical Courts which is exercised over the beneficed clergy of the Church of England; the ultimate decision resting with the Judicial Committee of the Privy Council.

CHAPTER XLVII.

ORGANISATION OF THE SUPERIOR COURTS UNDER THE JUDICATURE ACTS.

CIVIL procedure in the Superior Courts is now codified by the Judicature Acts, 1873–1891, and by the Rules of Court made under the authority of these Acts.

By this legislation, which began to come into operation from the 1st of November, 1875, is established a Supreme Court of Judicature consisting of two branches, namely, the High Court of Justice and the Court of Appeal.

The High Court of Justice is constituted as a Superior Court of Record, and to it is assigned the original jurisdiction exercised by the Superior Courts already described. In

regard, however, to incapacity by reason of unsoundness of mind, the jurisdiction of first instance is not assigned to the High Court of Justice as such, but is exercised by those judges of the High Court of Justice and of the Court of Appeal to whom the care of lunatics is committed by His Majesty. To these usually belong the Lord Chancellor and some of the Justices of Appeal.

The Court of Appeal is likewise constituted as a Superior Court of Record. This Court is empowered generally to decide upon appeals from a judgment or order of the High Court of Justice. Particularly, there is committed to it the appellate jurisdiction which formerly was exercised by the Court of Chancery and the Superior Courts of Common Law, including that exercised by the Court of Chancery as an Appellate Court in Bankruptcy. And there was also committed to the Court of Appeal the jurisdiction formerly exercised by His Majesty in Council (through the Judicial Committee of the Privy Council) on appeals from judgments of the High Court of Admiralty, or orders made by the Lord Chancellor, or other of the judges empowered, in matters of lunacy.

In order that the Courts so organised may have complete authority to decide the right in all civil causes, provisions are made to prevent the denial or delay of justice, which was formerly occasioned by the strict rules of the various Courts, and the consequential distinction between law and equity. It was, indeed, necessary to take precautions against the danger of a relapse into the strict methods of the old Courts. It is laid down, as a general principle, that for every complaint grounded on law or equity, relief is to be given, so that, as far as possible, all differences between parties shall be fully and finally decided, and a multitude of proceedings avoided.

In particular it is laid down that, for the future, the right (including the equity of the case) is not to be frustrated through any formal practice of the Courts. Moreover, in cases where formerly there was a conflict between the rules of law and equity, in default of a special rule to the contrary,

the principles of equity are to be followed. In claims of damage, by collision, to ships which are both to blame, the decision is to follow the Admiralty rule that the whole damage is to be equally shared by both, instead of the Common Law rule, according to which neither of the ships is to pay damages.

For the better despatch of business, the High Court of Justice is arranged in divisions; but so that no judge is to be prevented from sitting, where necessary, in any other division than his own. The divisions may, from time to time, be re-arranged, by Order in Council, on the report of the judges. The existing Divisions are: (1) the Chancery Division, with the Lord Chancellor as President; (2) the King's Bench Division, with the Lord Chief Justice of England as President; and (3) the Probate, Divorce, and Admiralty Division (commonly called the Probate Division). The work is specially appropriated, under the present rules, to the respective divisions, as follows:—

To the Chancery Division are specially appropriated—

(1) All matters in which, under any Act of Parliament, exclusive jurisdiction was given to the Court of Chancery. Such are the proceedings under expropriation clauses in the Lands Clauses Consolidation Act, 1845, etc.

(2) All proceedings for any of the following purposes:—

- (a) Administration of the estate of deceased persons, including the application of the property to payment of debts and division of the residue amongst the persons interested;
- (b) Dissolution of partnerships and the ordering of accounts between the partners;
- (c) Redemption and foreclosure of mortgages;
- (d) Raising of money charged upon land;
- (e) Sale, and distribution of proceeds, of property subject to any lien or charge;
- (f) Execution of trusts;
- (g) Rectification or annulment of written documents;
- (h) Specific performance of contracts relating to the sale of land;

- (i) Partition, or sale in lieu of partition, of land held in common ;
- (k) Guardianship over infants, and care of their property.

To the King's Bench Division are specially committed—

(1) The business which before the Judicature Acts belonged exclusively in the first instance to the Court of King's Bench ; that is to say, the ordering the issue of the respective Prerogative Writs of Mandamus, Quo Warranto, and Prohibition ; likewise the proceedings in Certiorari.

(2) The business which formerly belonged to the exclusive jurisdiction of the Court of Exchequer.

To the Probate Division are assigned those matters which formerly were subject to the exclusive jurisdiction of the Court of Probate, or of the Court for Divorce and Matrimonial Causes, or of the Court of Admiralty. And beyond these matters, the only business within the competence of the Probate Division consists of a limited class of cases in which, before the Judicature Acts, the Court of Admiralty had a concurrent jurisdiction with the Common Law Courts.

While the Probate Division has thus a strictly limited field of business, there are large classes of cases for which the Chancery Division and King's Bench Division are equally competent. In practice, owing to the traditions of the Bench and Bar, there has taken place an arbitrary distribution of business somewhat similar to that which formerly obtained between the Chancery and Common Law Courts.

In general the plaintiff or petitioner assigns his action or petition to one or the other Divisions by marking the introductory paper (writ or petition) accordingly. In all cases the Court may transfer the action or matter to the other Division. The Court may also keep the action or matter in the Division in which it is already depending, although it is not the one to which cases of that class are usually assigned. The commonest instances of the transfer of cases which have been assigned, is where the Chancery and King's Bench Divisions come into question. In such

cases the subject-matter is to be considered along with the question whether the case belongs to the class of those which are suited for trial by jury. Where the case is one in which the rule of law is clear, and not complicated with any question of equity, and the question of fact will obviously depend on a conflict of evidence—for instance, in an action for slander—the most convenient procedure is that before a judge of the King's Bench Division with a jury. Where the decision will depend upon a consideration of documentary evidence—as, for instance, an action for specific performance of a contract for the purchase of land—or where the decision would turn upon the effect of representation or unfair conduct not amounting to deceit in the strict sense of the word, the convenient procedure is a trial before a judge of the Chancery Division. There remains, however, a considerable range of matters which are suitable for trial in either Division.

The jurisdiction in bankruptcy is regulated by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). Cases that formerly belonged to the jurisdiction of the London Bankruptcy Court (comprising the City of London and the districts of the County Courts of Bloomsbury, Bow, Brompton, Clerkenwell, Lambeth, Marylebone, Shoreditch, Southwark, Westminster, and Whitechapel), belong now, in the first instance, to the jurisdiction of the High Court of Justice. Bankruptcy matters in the provinces go, in the first instance, to the County Courts. In both cases appeals go to the Court of Appeal; and with—but not without—the leave of the Court of Appeal, there is an appeal in the last resort to the House of Lords.

The jurisdiction which the High Court of Justice has, in the first instance, in bankruptcy matters, is assigned to the Chancery Division; and the business is done for the most part by the Chief Clerk or the Judge in Chambers (that is, in a room where the parties and their solicitors, and sometimes barristers, are present, but the public are excluded).

So far as relates to the person of the defendant, the jurisdiction of the Courts, except in the matters which

formerly belonged to the Court for Divorce and Matrimonial Causes, and to some of those which formerly belonged to the Court of Admiralty, is grounded on the power (actual or fictitious) of the Court to compel *appearance*—the equivalent in English law to the *litis contestatio* of the Roman law. In this the practice of the former Courts of Common Law, modified by that of the former Court of Chancery, is followed. Where the defendant voluntarily appears to the action, he submits to the jurisdiction and is bound just as in Roman law he was (*quasi ex contractu*) by the *litis contestatio*. If he does not voluntarily appear, the only limit to the jurisdiction of the Court is that indirectly prescribed by those rules of procedure under which the defendant is summoned to appear, with the consequence that if he fails to appear, judgment may be obtained in default of appearance. In short, if the defendant is served with the writ or equivalent document in England (including Wales), then the competence of the Court is established; if not, the question is (in the discretion of the Court to be exercised according to the circumstances) whether service, or notice in lieu of service, out of England, ought to be ordered (a).

In the matters which formerly belonged to the Court for Divorce and Matrimonial Causes and to the Court of Admiralty respectively, and are now assigned to the Probate, etc., Divisions of the High Court, the practice follows that of the former Courts. The practice of the Court for Divorce, etc., was laid down by the Act constituting the Court (20 & 21 Vict. c. 85), following the practice of the old Ecclesiastical Courts. Where the domicile and residence of both parties is in England, there is no difficulty; but difficult questions arise when one of the parties is domiciled and resident out of England. Generally, the jurisdiction for the purposes of divorce depends on the domicile of the husband. But, it has been decided by the Court of Appeal that a decree for divorce may be made by the Court on the complaint of the wife who lives in England, where the husband, a foreigner, has

(a) See as to details, p. 463, *post*.

lived there for several years, and has since committed adultery and deserted her.

In Admiralty causes the jurisdiction is generally, according to the practice of the former Admiralty Court, grounded upon the arrest of a ship in an English port.

In Bankruptcy the jurisdiction depends upon the domicile—including ordinary place of residence as prescribed by sect. 6 (1) (d) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52)—of the debtor.

The normal staff of the higher Judicial Courts, according to present arrangements, is as follows:—

House of Lords.—The House, as a judicial body for hearing appeals, consists in effect of (1) the Lord Chancellor; (2) three Lords of Appeal in Ordinary, appointed under the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59); and (3) such Peers of Parliament as hold or have held high judicial office as defined by the last-mentioned Act, and the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70).

Judicial Committee of the Privy Council.—Of this are members, the Lord Chancellor, the Lords of Appeal in Ordinary, and a number of judges whose regular duties usually keep them employed in their own Courts. A salaried judge and several unsalaried judges (generally persons who have occupied high judicial posts in India) are specially appointed as members; and the Court usually sits with four or five members present.

Supreme Court of Judicature.—The Court of Appeal consists of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the President of the Probate Division, and five Lords Justices of Appeal.

The High Court of Justice consists—

(1) In the Chancery Division—

Of the Lord Chancellor and five judges;

(2) In the King's Bench Division—

Of the Lord Chief Justice of England and fourteen judges;

(3) In the Probate, etc., Division—

Of the President and one judge.

Besides the judges above mentioned, each Court is furnished with a staff of registrars and clerks, charged with the duty of drawing up and recording the orders or decrees to carry into effect the judgments which, ordinarily, are delivered orally. To the Supreme Court of Judicature are also attached, in the Chancery Division, twelve "Chief Clerks," and in the Queen's Bench Division sixteen "Masters," to whom are delegated powers of a judicial nature. These are also assisted by a staff of clerks. Further, there are eight Taxing Masters (for the taxation of costs in the Chancery Division), with a staff of clerks. And there are "Official Referees," to whom questions are remitted for inquiry and report.

An important sub-department of the Supreme Court is the "Central Office," now regulated by R.S.C. Ord. 61. To this office are assigned various duties, including the issue of writs and summonses, the filing of affidavits, etc.

The Probate, etc., Division has still its separate staff for assisting the work of the judges, taxing costs, etc.

There is a special staff for bankruptcy business, consisting of four registrars, two taxing masters, an official assignee, etc.

The Jury.—A description of the organisation of the Courts would not be complete without referring to the jury, the constitution and functions of which remain almost unaffected by the Judicature Acts.

The investigation by a jury is a very ancient feature of English procedure, as well in civil as in criminal cases. In ancient times the inquiry was conducted by twelve impartial men from the neighbourhood, who discharged the combined office of witnesses and jury. A trace of the old constitution of the jury survives in the reasons for the rule settled by *Bushell's* case, in 1679 (Vaughan, 135), that a jury cannot be held liable for a false verdict. The modern office of the jury is, after hearing the witnesses, the speeches of the parties or their counsel, and the summing up of the

judge, to find a verdict, which may be a general verdict for the plaintiff or defendant, as the case may be, or a special verdict giving answers (yes or no) to particular questions of fact. In all civil cases the Court may exercise a control. It may nullify a general verdict on the ground of evident misapprehension by the jury of the rules of law, and, even upon the question of fact, may overrule a verdict, whether general or special, if it is against evidence; that is, if it transgresses the bounds of a reasonable appreciation of the effect of the evidence. It is, however, absolutely within the province of the jury, where the witnesses contradict each other, and the issue depends on the credibility of the witnesses, to determine which are to be believed.

CHAPTER XLVIII.

THE ORGANISATION OF LAW AGENCY.

THE permission to act for another in procuring the issue of a writ, or to represent another before a Court of Justice, was formerly confined to those persons—whether called attorneys, solicitors, or procurators (proctors)—who had been admitted by that Court to practise before it. Those who were admitted by the respective Superior Courts of Common Law were called “attorneys,” those admitted by the Court of Chancery were called “solicitors,” those allowed to practise before the Ecclesiastical Courts were called “proctors” (the *procurator* of the civil and canon law). By various statutory enactments these several bodies of agents have been amalgamated. And now, all persons who were qualified to practise in any of the Courts whose jurisdiction has been transferred to the High Court of Justice or the Court of Appeal, are combined in one society, and called “solicitors of the Supreme Court.” A solicitor of the Supreme Court is authorised to practise in an inferior Court if he inscribes himself on the list of that Court; and no one can practise, as representing a party before any

Court, who is not admitted as a solicitor of the Supreme Court.

The privilege of being heard before a Court on behalf of another person, and particularly of addressing oral argument to a judge or to a jury in presence of a judge, is not necessarily within the competence of a solicitor. In the Supreme Court (with the exception of the business done "in chambers") the privilege is confined to barristers—of whom later. In most of the inferior Courts, a solicitor may conduct the case. When the case comes to be heard before the Court, the party himself, whether he has or has not committed the general management of his case to a solicitor, may, in his own person, conduct his case before the Court. But where he has committed the conduct of the case in Court, whether to a solicitor in an inferior Court, or to a barrister in any Court, he cannot be heard in person.

The requirements for admission as a solicitor are: (1) that he has served as articled clerk to a practising solicitor under articles from a period of five years, a period which may be shortened under certain prescribed conditions; (2) that he has passed the prescribed examinations.

For persons who have taken a degree at one of the English universities, or at the University of Dublin, or have been admitted to one of the recognised bodies of law agents practising before the Supreme Court or the Sheriff's Courts in Scotland, the period of service as an articled clerk is reduced to three years. Moreover, authority is given to certain judges to make a regulation limiting the period of service to four years for such persons as have passed an examination in any educational institution prescribed by such regulation. Also persons who have previously served as clerks to a solicitor, without articles, have the right to qualify by a further service of three years under articles.

The required examinations are from time to time prescribed by regulations made by the Council of the Incorporated Law Society, under the supervision of the President

of the King's Bench Division and the Master of the Rolls. The present requirements are shortly these: There is a preliminary examination upon general knowledge, from which those persons are excused who have taken certain university degrees or passed any one of the prescribed university examinations. Further provisions are made for special cases. There is an intermediate examination for articled clerks during the time of their service, to test the progress they have made in the knowledge necessary for the practice of the profession of solicitor. For this examination is required a general acquaintance with the contents of one or more standard books upon English law.

For those who are to obtain admission as solicitors, there is a final examination. This relates as well to the fact that the candidate has completed the service under his articles, as to his capacity for the practice of his profession as solicitor in all the branches of business which is usually done by solicitors, including an inquiry as to moral qualification, if any caveat on that ground has been entered with the Registrar of Solicitors.

The range of subjects for the final examination is wide. Knowledge is required of the principles of the law of real and personal property, and the practice of conveyancing; also of the principles of law and procedure in the different classes of matters which are usually determined in the three Divisions of the High Court of Justice; and also of ecclesiastical and criminal law and practice, and of proceedings before justices of the peace.

After the final examination, there is, under present arrangements, a voluntary examination for honours.

All examinations for solicitors are held under the direction and supervision of the Incorporated Law Society, and their certificate that the candidate has passed all three examinations is a condition of admission. The candidate who has been refused a certificate has the right to appeal to the Master of the Rolls.

A barrister who, after he has practised for not less than

five years, allows himself to be ~~dis~~barred in order to become a solicitor, and has obtained from two Benchers of his Inn a certificate of fitness to practise as a solicitor, may be admitted without serving under articles, and without any other test than the final examination.

Besides admission, a solicitor must, in order to be qualified to practise, take out a stamped certificate, and this must be renewed annually. A solicitor who has not taken out or renewed his certificate is disentitled to practise as a solicitor, just as if his name was not on the roll. Without the certificate he cannot, by any legal means, recover his costs, and he is further liable to fine and punishment. The names of all persons who are legally entitled to practise as solicitors appear from year to year in the Law List (published by Stevens & Sons, Chancery Lane). This list, so far as relates to solicitors, is published under the authority of the Commissioners of Inland Revenue.

The payment of solicitors is regulated by law. A solicitor can only legally require payment of his costs a month after delivery of a signed bill of costs. The client can, before payment, require the taxation of the bill by one of the taxing masters of the Court. He can on a summary application obtain an order of the Court that the solicitor deliver his account, and that the account be taxed, and that on payment of what is certified to be due, the solicitor deliver up all documents which he has belonging to the client. Only in the case where the solicitor shows, on proof of probable grounds, that the debtor is about to leave England, or to become a bankrupt, or otherwise to do some act to defeat the claim, can the solicitor be authorised by leave of a judge to sue for his costs, and have them referred for taxation, before the expiry of a month from the delivery of his bill (The Legal Practitioners Act, 1875, 38 & 39 Vict. c. 79).

Formerly, it was not lawful for a solicitor to stipulate for remuneration differing from that fixed by the tariff. But since the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), a solicitor may, subject to the provisions of the Act, make an agreement in writing with his client respecting

the amount and manner of payment for the whole or any part of any past or future services as solicitor, or as a conveyancer, either by a gross sum, or by commission or percentage, or by salary, or otherwise.

It is, however, provided that, where the agreement relates to business done in an action, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by a taxing officer of the Court having power to enforce the agreement (sect. 4).

No agreement (*a*) under the Act can be enforced by an ordinary action. Either party has a remedy on a summary application (by summons or petition of course) upon which the validity and effect of the agreement is judicially considered. The Court before whom the application is brought may order payment according to the agreement or otherwise, or may set aside the agreement and order taxation as if the agreement had not been made (sects. 8, 9).

If the amount agreed on has been paid without judicial authority, the person who has paid it may, within twelve months, obtain an order to reopen the agreement, with consequential directions for repayment (sect. 10).

Any such agreement excludes any claim by the solicitor beyond the terms of the agreement in respect of the services or business to which it relates (sect. 6).

A provision in any such agreement that the solicitor shall not be liable for negligence is void (sect. 7).

Nothing in the Act is to render valid any purchase by a solicitor of the interest of his client in the subject-matter of an action, or to give validity to any agreement by which the solicitor stipulates for payment only in the event of success (sect. 11).

Except as otherwise by the Act provided, the agreement excludes the necessity of taxation, and the delivery of a signed bill, as a condition precedent to the solicitor's right to payment (sect. 15).

(*a*) But as to conveyancing business, see the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), pp. 458, 459, *post*.

A solicitor may take security from his client for his future costs to be ascertained by taxation or otherwise.

In relation to conveyancing business, the mode of remuneration of solicitors is substantially altered by the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44). This Act, for the first time, expressly sanctions the principle of payment according to the value of the subject-matter of the business. By this Act the Lord Chancellor and other high legal dignitaries were constituted as a body empowered to draw up, for regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, a scale of charges to be embodied in a general order, to be finally settled after communication with the Council of the Incorporated Law Society, and laid before Parliament.

It was by the Act (sect. 8) made competent for a solicitor, whether such a general order was in force or not, to make an agreement with his client for remuneration, at the rate agreed on between them, in respect of conveyancing business, either by a gross sum, or by commission or percentage, or by salary or otherwise, and it was made competent for the client to pay and the solicitor to accept payment accordingly. The agreement must be in writing, and signed by the person to be bound by it, or by his agent. The agreement might be made on the terms that disbursements by the solicitor in respect of searches, plans, travelling, etc., should be included, or should not be included, in the payment stipulated for (sect. 8 (1), (2), (3)).

An agreement under this Act may be sued on or impeached or set aside in like manner and on the like grounds as any other agreement *not* relating to the remuneration of a solicitor; but if, under an order for taxation of costs, the agreement is relied on by the solicitor and objected to by the client as unfair or unreasonable, the taxing master may inquire into the facts and report to the Court, who, if just cause is shown for cancelling the agreement or reducing the amount, may order accordingly (sect. 8 (4)).

It is further enacted that the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), shall not apply to any business to which this Act (the Act of 1881) relates (sect. 9).

A solicitor who is employed for an action or other legal proceeding relating to property, is entitled to have his taxed costs and disbursements satisfied out of the property which has been recovered or preserved by his exertions. This claim may be given effect to by a charging order to be obtained in the pending proceedings (The Common Law Procedure Act, 1860, 23 & 24 Vict. c. 127, s. 28).

It is expressly forbidden for a solicitor to appear in the place of an unqualified person, in any action or bankruptcy proceeding, or to allow his name to be used in such action or proceeding on account or for the use of an unqualified person, or to do anything so as to put such unqualified person in the position of discharging the office of a solicitor. In case of contravention of this prohibition, the solicitor may be struck off the rolls, and disqualified from practising as a solicitor ; and the unqualified person be punished with a year's imprisonment (The Solicitors Act, 1843, 6 & 7 Vict. c. 73, s. 32).

A solicitor is an official of the Supreme Court, and generally a complaint against him of "professional misconduct" may be brought by summary petition before the High Court of Justice. The usual procedure is that the application is heard by the committee appointed under the Solicitors Act, 1888 (51 & 52 Vict. c. 65). The committee, if they are of opinion that there is a *prima facie* case, report to the Court, who may make such order thereon as they see fit.

When an application is made to strike a solicitor off the rolls, notice is to be given to the Registrar of the Incorporated Law Society, who acts according to the instructions of the Council of the Society.

Barristers.—The origin of the institution of barristers in England is obscure. It appears that in early times, in the suburbs about Temple Bar, there were a number of societies or schools for the study of the law. Sir

John Fortescue, who wrote in the time of Henry VI. (about 1450), mentions that there were then ten smaller Inns, called Inns of Chancery, engaged in this study, each having, on an average, about 100 students. These formed a kind of preparatory school, whence the students who had made some progress were admitted to the more advanced schools, called Inns of Court. Of these there were four; the smallest of them had about 200 students, of whom a considerable number were of full age. In the prescribed course a student became barrister. After a sixteen years' experience as student and barrister, one who was capable or lucky enough rose to the degree of a serjeant-at-law, and obtained the exclusive privilege of being heard before the Court of Common Pleas, where all "real" actions were transacted. It may be inferred that the privilege of being heard for a client before the Superior Courts was already confined to barristers.

The exclusive privilege of the serjeants-at-law was in course of time found to be attended with inconvenience to suitors and to the public. In the year 1834 an attempt was made to abolish the privilege by the Royal Prerogative. This led to a curious controversy, with the result that the abolition of the privilege by Royal order was, by the Judicial Committee of the Privy Council, declared to be *ultra vires*. Ultimately, by an Act of Parliament in 1846 (9 & 10 Vict. c. 54), the exclusive privilege of serjeants-at-law to practise in the Court of Common Pleas was abolished, and the right extended to all barristers.

It has long been the acknowledged right of the officers of the Crown—the Attorney-General and the Solicitor-General—to be within the Bar and to have preaudience before other barristers. The right of the Crown is also well established to appoint as King's Counsel, or to grant patents of precedence to, other members of the Bar, who become entitled accordingly to take a seat within the Bar and to have precedence over others, and precedence among themselves according to the date of their patents.

A barrister in the conduct of his case is, so far as relates

to any right of action, absolutely privileged. That is to say, no action of slander will lie against him for any statement made on behalf of his client; nor can his client succeed in an action against him for negligence. *E converso*, he has no right of action to recover his fees.

The supervision as to professional conduct of barristers is from time to time exercised by one of the four Inns of Court by which he was called to the Bar. The respective Inns have the power to take back the call, and exercise this power by a judgment according to their discretion and without any appeal. This power, as well as the whole administration of the Inns of Court, lies with the Benchers—the governing body elected by co-optation—consisting usually of the King's Counsel, who are members of the Inn, and a few other members.

The existing rules for examinations for admission to the Bar are issued by a joint committee of the four Inns of Court, to whom the Inns have delegated their authority. It is still within the power of each of the Inns to withdraw from the arrangement and to set up its own rules. The requirements for admission to the Bar, other than the examinations, still depend upon the practice of the different Inns.

CHAPTER XLIX.

PROCEDURE BEFORE THE SUPREME COURT.

THE rules of procedure made under the powers of the Judicature Acts, 1873–1891, will be found at length, with notes relating to their judicial interpretation, in the “Annual Practice.” In the sketch here presented to the student it will be sufficient to give the leading features of an ordinary action in the King's Bench Division or Chancery Division, unencumbered with the specialties relating to persons under disability, or to cases involving numerous parties.

THE COMMENCEMENT OF THE ACTION BY "WRIT OF SUMMONS."

An "action" in the High Court of Justice is commenced in general (*a*) by a writ of summons, that is to say, a writing in the name of the King, commanding the defendant to cause appearance to be entered for him in the action. This writ is issued from the Central Office of the Royal Courts of Justice in London or from a District Registry; and must state the Division of the Court to which the action is assigned.

The writ of summons is prepared by the plaintiff, or his solicitor, and must, before it is issued, be endorsed with a brief statement of what is claimed: and it must be stated whether the writ is issued by the plaintiff in person or by his solicitor, with the residence or address for service (as the case may be). If the writ is issued from the Central Office, and the address given is more than three miles from the Central Hall of the Royal Courts, the plaintiff must give an address for service, where all documents brought into the process may be delivered. Likewise must the plaintiff, if the writ is given out from a District Registry, give an address within the district, and if the plaintiff does not reside within the district, he must also give an address for service within three miles of the Central Hall of the Royal Courts.

SERVICE OF THE WRIT.

The writ of summons is issued under the seal of the Court, and is then ready for service on the defendant. At the same time a copy, signed by the plaintiff or his solicitor, is returned to the office and kept there. Where there has been, before action brought, a correspondence between the

(*a*) In certain kinds of questions, which formerly were incidental to suits in Chancery, the proceeding may be commenced by an "originating summons," which is not technically a "writ," and does not expressly require the appearance of all parties. The object of this is to save much of the expense which was formerly incurred by a suit in which the whole proceeding of administration of an estate was worked out by the Court.

solicitors of the parties, it is usual for the solicitor of the plaintiff to ask the solicitor of the defendant to accept service. If this is done, and the writ served accordingly, the question of service is settled. Otherwise the defendant must be served personally, that is to say, a copy of the writ must be delivered to the defendant by a person who has the original in his possession, and must show it if required. In the case of merchants trading under a firm, and in the case of companies, it is sufficient that the copy of the writ is delivered at the principal place of business to some person there in charge.

If the personal service cannot easily be effected, then the Court or a Judge, upon proof by affidavit that service has been ineffectually attempted, and that in some other way the summons can be brought to the knowledge of the defendant, may make an order for substituted service (that is, service upon some other person), or notice in lieu of service, in such a manner that the defendant may probably become acquainted with the contents of the writ.

All this is on the assumption that the writ can be served in England (including Wales). But where the defendant resides out of England, a special order of the Court must be obtained—either before or after the issue of the writ—for service out of the jurisdiction. The cases in which such an order may be obtained are the following:—

- (a) If the subject-matter of the proceeding is land in England; or
- (b) A contract or liability affecting land in England is to be enforced or otherwise dealt with in the action; or
- (c) Relief is sought against a person domiciled or ordinarily resident in England; or
- (d) The action is for the administration of the estate of a deceased person who died domiciled in England; or for the administration of an English trust of which the person to be served is a trustee; or
- (e) The action is for breach within England of a contract (wherever made) which, according to its terms,

ought to be performed in England, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

(f) An injunction is sought which is to take effect in England; or

(g) A person out of England is a necessary party to an action properly brought against a person who is duly served in England.

Under the above head (e), the power of the Court to make an order for service in Scotland or Ireland, if the defendant is domiciled or ordinarily resident there, is expressly excluded. It is assumed that in such a case the action may be more conveniently brought against the defendant in the Court of his residence. And, in all other cases, where leave is asked to serve a writ in Scotland or Ireland, the Court or Judge, in granting leave, is to have regard to the comparative ease and convenience of proceeding in England or in the place of the defendant's residence.

If the defendant is neither a British subject nor is resident in England, then the service must be, not of the writ, but of notice of the writ. The distinction is a fine one, but involves the principle that the writ, being the command of the King, cannot properly be delivered abroad to one who is not His Majesty's subject. The service of the notice is effected in the same way in which writs are usually served.

APPEARANCE.

The next step of procedure is the appearance of the defendant. This is the act (equivalent to the *litis contestatio* of the Roman law) by which the defendant submits the contention to the jurisdiction of the Court. In the ancient practice of the Common Law Courts, nothing could be done without the appearance. The various steps to compel appearance—by imprisonment, attachment of goods, and, finally, process of outlawry—occupy a large space in the old common law procedure. Much of this procedure became obsolete by statutory enactments, especially by the Common

Law Procedure Act, 1852. By the modern procedure, the rules for obtaining judgment *in default of appearance* completely supersede the old proceedings for compelling appearance.

Appearance consists of the entry, at the proper office, of a memorandum containing the date of entry, and the name and place of business of the defendant's solicitor, or stating that the defendant appears in person, and giving his address.

If the writ of summons has been issued out of the Central Office in London, the appearance must be entered at the Central Office. If the writ has been issued out of a District Registry, then, if the defendant resides or has his place of business in the district, he must enter appearance in the District Registry; if he does not reside or carry on business in the district, he may enter appearance either in the Central Office or in the District Registry.

If the appearance is entered in London, the address given must be within three miles of the entrance to the Royal Courts, or else an address for service, at a place within that radius, must be also given.

The memorandum of appearance is made out in duplicate, the original filed in the office, and the duplicate sealed there and given back to the defendant or his solicitor, who must on the same day give notice to the plaintiff, accompanied by the sealed duplicate memorandum.

JUDGMENT IN DEFAULT OF APPEARANCE.

In order to obtain against a defendant a judgment in default of appearance, an affidavit must be made showing that the writ of summons, or notice of the writ (as the case may be), was duly served.

If the writ of summons has been indorsed with a claim for a liquidated amount, the plaintiff may, in default of appearance, enter final judgment for any sum not exceeding the sum indorsed on the writ, with interest at the rate specified (if any), and, if no rate is specified, at £5 per cent. to the date of the judgment, and costs. If there are

several defendants, of whom one or more appear, and another (or others) fail to appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution on that judgment without prejudice to his right to proceed with the action against those who have appeared.

If the claim is for damages (*i.e.* an unliquidated demand), the plaintiff may, in default of appearance, enter interlocutory judgment, and a writ of inquiry issues to ascertain the amount; or the Court or Judge may otherwise give directions for ascertaining the amount. In the same manner the plaintiff may proceed against one or more of a number of defendants who have failed to appear, the inquiry as to value being only postponed until the trial with the defendants who have appeared.

In like manner, where there is a claim for a liquidated sum, and also a claim for damages, the plaintiff may, in default of appearance, obtain a final judgment for the liquidated sum and an interlocutory judgment, with an inquiry as to the amount, so far as relates to the damages.

In cases where the claim is other than a simple claim for a liquidated sum, or damages, the plaintiff, by filing an affidavit of service, and also a statement of claim, may proceed as if the party had appeared; that is to say, he may set the case down on motion for judgment, and such judgment shall be given as the Court or Judge think the plaintiff entitled to upon the statement of claim.

A judgment obtained in default of appearance may afterwards be set aside or varied by the Court or a Judge on such terms as may be just.

OTHER SUMMARY JUDGMENTS.

Where the demand arises out of a simple contract or instrument of debt, and is for a liquidated sum of money with or without interest, the writ of summons may be *especially indorsed* with a claim in the prescribed form—setting forth briefly the ground of claim (such as that the defendant is drawer or acceptor of a bill of exchange or

otherwise) and the particulars of principal and interest due. Upon such a summons the plaintiff may, although the defendant has appeared, upon affidavit that he has a good ground of action, and of his belief that there is no defence to the action, apply to the judge for leave to enter final judgment for the amount indorsed, and costs. Thereupon, unless the defendant, by affidavit or by his own *vivâ voce* evidence or otherwise, satisfies the judge that he has a defence on the merits, an order will be made accordingly. The defendant may obtain leave to defend upon the terms of bringing the money into Court, or upon such other terms as the Court or Judge may think fit.

The same procedure (except as to bringing the money into Court) applies to an action for the recovery of land (with or without mesne profits) in a simple action by a landlord against a tenant whose term is expired or has been duly determined by a notice to quit.

Where a writ of summons is indorsed "for an account," or where the claim indorsed involves the taking of an account, if the defendant fails to appear, or does not, after appearance, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the proper accounts, with all inquiries and directions usual in the Chancery Division, is made forthwith.

PARTIES.

By the modern rules, precautions are taken that mistakes made in the commencement of proceedings, whether by introducing unnecessary parties, or by the omission of proper parties, do not make the proceedings abortive. A large discretion is given to the Court as to the conditions on which the names of parties, whether plaintiffs or defendants, may, at any stage of the proceedings, be struck out or added. The name of a plaintiff cannot be added without his consent, but if a necessary party refuses his consent he can be made a defendant.

It is always advisable, in commencing an action, that

the persons to be made plaintiffs or defendants should be carefully considered. An error in this respect may still incur unnecessary costs. The plaintiffs to be joined must be persons in whom a right arising out of the same ground of action, whether jointly, severally, or in the alternative, is alleged to exist. As to defendants, the rule is that all persons may be joined against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative.

In an action for the administration of the personal estate of a deceased person, or for the execution of a trust, or for an account, judgment may be obtained in an action between any one of the persons interested as plaintiff, and the executor or trustee as defendant, or *vice versâ*, for the necessary accounts or inquiries; but in working out the judgment, notice must be given, according to the directions of the Court or a Judge, to parties interested. Where the judgment directs inquiry for an unascertained class of persons, such as next-of-kin, etc., directions are given for notice by advertisement.

The Court has power, where the interest of an unascertained person or class, such as heir-at-law, next-of-kin, etc., is in question, to appoint some one to represent such person or class, who will accordingly be bound by the judgment.

As to partnership firms who are parties to an action, the rule is that any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the names of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action. Where a firm sues or is sued in this form, any other party to the action may apply for an order that the names of the persons in the firm shall be furnished by a statement to be verified on oath.

Formerly an action was abated by the death or bankruptcy of a party. Now the rule is that the action does not become abated if the cause of action survives. Where

there is a change of interest by reason of marriage, death, or bankruptcy, or any other event, causing a transmission of interest, an order may be obtained, by an *ex parte* application in the action, for the addition of the person on whom the interest has devolved, as a party, and that the action shall be carried on between the continuing parties and the new party.

JOINDER OF CAUSES OF ACTION.

Formerly there was a stringent rule against the joinder of different causes of complaint in one action. This arose from the strict adherence to the various forms of writs according to the ancient practice. The rule was considerably modified by the Common Law Procedure Act of 1852. In Chancery a suit might be dismissed for “multifariousness,” though what constituted *multifariousness* was never exactly defined. By the new rules the misjoinder of causes of grounds of complaint is not a ground for dismissal of the action; and the leading principle as to what causes may, or may not, be joined together in the same action is that of convenience. The Court has a wide discretion to determine what is convenient. If the plaintiff joins causes of action, which cannot conveniently be tried or disposed of together, the Court may order separate trials, or may make such other order as may be necessary or expedient for the separate disposal of the claims. It is a general rule that, except by leave of the Court, no cause of action, other than the claim for mesne profits or arrears of rent, or consequential damages, shall be joined with an action for the recovery of land. But this does not apply to a claim for possession of the land, joined with an action for redemption or foreclosure of a mortgage.

STAY OF PROCEEDINGS UNDER ARBITRATION CLAUSE IN CONTRACT.

If an action or proceeding is commenced upon a contract containing an arbitration clause, any defendant party to

the contract may, after appearance, and before delivering a defence or taking any other step in the action, apply for a stay of proceedings; and the Court or a Judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the contract, and that the applicant was, at the time of the commencement of the action or proceeding, and still is, ready and willing to do all things necessary to the proper conduct of the arbitration, will make an order staying the proceedings.

This rule was substantially contained in sect. 11 of the Common Law Procedure Act, 1854, and is now embodied in sects. 4 and 27 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49). The provision of the Common Law Procedure Act has been liberally interpreted by the Court (*Willesford v. Watson* (1873), L. R. 8 Ch. 473; 3 R. C. 373 and notes). And the Arbitration Act contains ample provisions for carrying out the arbitration and enforcing the award, whether the persons to act as arbitrators have, or have not, been named or described in the contract.

PLEADINGS.

Before the new reforms in procedure made under the Judicature Acts, the pleadings or statements in writing on either side by which the case was prepared for a trial upon the issues of fact, were excessively technical and cumbersome. In the Courts of Common Law the pleader endeavoured to put his case in various forms, so that in one way or other his claim or defence, as the case might be, should hold good in law. But not one of these statements gave an intelligible account of the real transaction. In the Court of Chancery the pleadings were encumbered with a mass of minute details, including elaborate statements of the evidence on which the plaintiff relied to establish his case, or on which the defendant relied to disprove it. The method is now entirely changed. The general rule now is that every pleading shall contain only a statement of the essential facts on which the party relies, including the

essential contents of the critical documents, but without long quotations or statements of evidence; and the practice of the legal profession has generally conformed to the spirit of the rule. Where a case of fraud or misrepresentation has to be dealt with, the pleading must necessarily be lengthy; but even in such cases the statement of claim presents a striking contrast to the old Bill in Chancery, by which such a case was introduced in the old practice. The contrast is still greater between the "defence" in the present practice and the "answer" to a Bill under the old practice, in which every statement and suggestion made by the Bill was elaborately traversed.

Where pleadings take the regular course, the plaintiff, in the first place, within the time prescribed by the rules, or by the order on the summons for directions (to be presently referred to), delivers his statement of claim.

The statement of claim, besides setting forth the facts on which he relies, must expressly state the relief which he seeks. He may ask for different kinds of relief in the alternative; for example, specific performance of a contract, or damages for the non-fulfilment. If the plaintiff makes claims which rest on different grounds, he must set forth the grounds, so far as possible, separately and distinctly. The same rule applies, so far as it is applicable, to counterclaims made by the defendant with his defence.

Likewise, the defendant must in due time deliver his statement of defence, which may be accompanied by a counterclaim; and the plaintiff may also in due time deliver a reply, and these may be (but are not frequently) followed by subsequent pleadings. In his defence the defendant must specially deny the existence of such facts (except as to the amount of a claim for unliquidated damages) as he does not intend to admit. So must the plaintiff in his reply traverse the facts of which he denies the truth. In any further pleading it is sufficient to "join issue," generally, upon the facts stated in the previous pleading. It is now no longer necessary to deliver any pleading beyond the defence, where it is a simple defence,

or beyond the reply, so far as it is a defence to the counter-claim. When no further pleadings are delivered, the effect is that all assertions of fact contained in the last pleading are put in issue. The defendant may, before or at the same time, with the delivery of his defence, or later, with the leave of the Court, pay into Court a sum of money by way of satisfaction ; or he may (except as to a claim of damages for libel or slander) pay money into Court with a defence denying liability. In the latter case the plaintiff may either accept the money, and have it paid out to him by way of satisfaction, and may further claim the costs ; or he may proceed with his action at the risk (if the defendant succeeds) of getting nothing and having to pay the costs.

A party need not, in pleading, state any fact which is presumed by law ; for instance, the payment of value for a bill of exchange, when the plaintiff only claims upon the bill, and does not expressly state the value received.

The pleadings, when prepared by counsel, are signed by him ; otherwise, by the solicitor ; or, when the party appears in person, by himself.

In actions for collisions at sea, whether brought in the Admiralty Division or otherwise, there are special rules to test the *bonæ fides* of the claim, and in order that the facts may be recorded when fresh in the recollections of the parties on either side. Unless the Court or a Judge otherwise orders, each party must within the prescribed time file a "preliminary act," to be sealed up until ordered by the Court to be opened, containing a statement of the following particulars :—

- (a) The names of the vessels and of their masters.
- (b) The time of the collision.
- (c) The place of the collision.
- (d) The direction of the wind.
- (e) The state of the weather.
- (f) The state and force of the tide.
- (g) The course and speed of the vessel when the other was first seen.
- (h) The lights (if any) carried by the former.

- (i) The distance and bearing of the other vessel when first seen.
- (k) The lights (if any) of the other vessel when first seen.
- (l) Whether any lights of the other vessel, other than those first seen, came into view before the collision.
- (m) What measures were taken, and when, to avoid the collision.
- (n) The parts of each vessel which first came into contact.
- (o) What sound signals (if any), and when, were given.
- (p) What sound signals (if any), and when, were heard from the other vessel.

These preliminary acts come in place of the pleadings in an ordinary action. If either party relies on the defence of compulsory pilotage, he must give notice within two days after the preliminary acts are opened.

The times within which pleadings are to be delivered in a regular course are prescribed in the earlier rules under the Judicature Acts; but as these may be, and usually are, modified by the directions given under the summons for directions pursuant to the rules of 1902, it would be superfluous in this brief sketch to enter into such details.

Where the action is commenced by a writ specially indorsed for summary judgment (see p. 466, *supra*), any further pleading, except so far as may be allowed by the terms of an order giving leave to defend, is dispensed with.

TRIAL WITHOUT PLEADINGS.

A trial without pleadings may proceed under the following conditions :—

The indorsement of the writ must contain a sufficient notice of the nature of the claim and the relief sought; and a statement that, if the defendant appears, the plaintiff intends to proceed to trial without pleadings.

Within ten days of appearance the plaintiff must serve twenty-one days' notice of trial without pleadings; or the

defendant may, within ten days of appearance, apply by summons for delivery of a statement of claim; and on this summons the judge may order—

- (a) that a statement of claim shall be delivered, in which case the action will proceed in the usual manner; or
- (b) that the action shall proceed to trial without pleadings, and (if the judge thinks fit) that either party shall deliver particulars of his claim or defence.

If the defendant does not take out a summons for delivery of a statement of claim, he is not allowed at the trial to rely on a set-off or counterclaim or other special ground of defence, unless he has within ten days of appearance given notice of such grounds of defence.

If the defendant has taken out a summons for delivery of a statement of claim, and the judge has ordered that the action shall proceed to trial without pleadings, and has made no order as to particulars, all defences are open to the defendant at the trial. If the judge has ordered particulars, the parties are bound by the particulars they deliver.

SUMMONS FOR DIRECTIONS.

After appearance, and before the plaintiff takes any fresh step in the action, other than application for an injunction or for a receiver, the plaintiff must (except in the cases immediately after-mentioned) take out a summons for directions.

The exceptions are (a) actions which, before the Judicature Acts, would have been within the exclusive cognizance of the High Court of Admiralty; (b) actions in which the writ is specially indorsed; (c) where the writ is indorsed with the statement of intention to proceed to trial without pleadings (see p. 473, *ante*); and (d) proceedings commenced by originating summons: but in any such action or proceeding a summons for directions *may* be taken out at the instance of any party.

Where the plaintiff applies for summary judgment on a writ specially indorsed; or where the writ has been indorsed with the statement of intention to proceed to trial without pleadings, *and* the defendant has applied for a statement of claim, the judge may deal with the application as if the plaintiff had been entitled to take out, and had taken out, a summons for directions.

The order made upon the hearing of the summons (which is usually in Chambers) is intended to prepare the case for the final hearing or trial, and deals particularly with the following proceedings: pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of property, commissions, examination of witnesses, place and mode of trial; and may comprise any other interlocutory matter.

In any action (*i.e.* an action commenced by writ) to which the rule applies, if the plaintiff does not within fourteen days from the entry of the defendant's appearance take out a summons for directions, the defendant may apply for an order to dismiss the action; and thereupon the action may be dismissed, or the application may be dealt with as if it were a summons for directions.

The rules as to a summons for directions are apparently intended to avoid separate applications for various interlocutory matters; and the Court or Judge will doubtless take care that unnecessary costs are not incurred by separate applications which might have been dealt with under the summons for directions.

JUDGMENT IN DEFAULT OF PLEADING.

If the plaintiff, where he is bound to deliver a statement of claim, does not deliver it in due time, the defendant may apply for an order that the action shall be dismissed with costs for want of prosecution. If, upon the hearing of the application, the plaintiff states that he is desirous to proceed, the Court may give him further time upon terms, including, of course, his payment of the costs of the

application, and, generally, a peremptory limit as to the time of pleading.

If the defendant is in default in delivery of his defence, the plaintiff, where his claim is for a liquidated sum of money, may apply for final judgment for the sum claimed in the action and his costs. If there are several defendants, and one of them is in default, the plaintiff may in like manner proceed against the defaulting one without prejudice to his right against the others.

Where the claim is for unliquidated damages, the plaintiff may, in default of delivery of a defence, obtain an interlocutory judgment, and an inquiry as to the amount of damages, just as in the case of default of appearance.

In all cases, where not otherwise stated in the Rules, the plaintiff can, in default of defence, obtain such judgment as the Courts may consider him entitled to upon his statement of claim.

A judgment in default of pleading may, like a judgment in default of appearance, be set aside on such conditions as to costs and otherwise as the Court or a Judge may think fit.

TRIAL—WITH OR WITHOUT A JURY.

The place of trial is fixed by the Court or a Judge. This is usually done on the summons for directions.

In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff or defendant may, upon due notice, signify his desire to have the issues of fact tried by a judge with a jury, and thereupon the same shall be so tried.

Causes specially appropriated to the Chancery Division (see p. 447, *supra*) are tried by a judge without a jury, unless the Court or a Judge otherwise orders. In other cases (except actions for slander, etc., *supra*), the Court or a Judge may direct the trial to be without a jury; but in default of such direction, any party may, upon due notice, apply that the action, or any issue of fact, may be tried with a

jury. Where the above directions for trial with a jury do not apply, the usual mode of trial is by a judge without a jury; but the Court or a Judge may order a trial by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee sitting with or without assessors; or may order that different questions of fact arising in the action may be tried by different modes of trial and in different places, and that one or more questions of fact may be tried before others.

The regular mode of conducting a trial is as follows:—The plaintiff (a) or his counsel opens his case, reading or referring to the documents upon which he relies, and stating the facts which he is prepared to prove by witnesses. He then calls and examines the witnesses. Each witness may then be cross-examined by the defendant or his counsel, who by his cross-examination is expected to indicate the nature of the defence on which he intends to rely. After cross-examination the plaintiff may re-examine upon any point arising in the course of cross-examination, and the judge may at any time intervene with a question to elucidate the matter in dispute. The judge takes notes of the evidence, and may disallow a question which he considers irrelevant or needlessly vexatious, although a reasonable latitude is usually allowed in cross-examination. Where a question is asked in cross-examination upon a matter collateral to the issue, the answer of the witness must (as a general rule) be taken as conclusive. If, however, he denies that he has been convicted of a crime, evidence of the fact of conviction may be given to contradict him. When the evidence for the plaintiff has been concluded, the plaintiff or his counsel may, if his opponent does not announce his intention to adduce evidence, sum up the evidence and address to the judge or the jury, as the case may be, any relevant observations. If the

(a) By the "plaintiff" is here meant the plaintiff in the issue, that is, the person who is to prove the affirmative of the issue, and who has the right to begin. He may, or may not, be the same person who is, technically, the *plaintiff in the action*.

defendant does not call witnesses, he or his counsel may then address the judge (or jury), as the case may be; and this is an end of the arguments. If the defendant calls witnesses, his case is conducted in the same manner as already stated in regard to the plaintiff's case; and the plaintiff or his counsel has then the right to reply with an argument upon the whole case. If the case is tried with a jury, the next thing is for the judge to sum up the evidence and direct the jury as to the points which they have to consider in their verdict. On the verdict being given, the judge may at once pronounce judgment, or may reserve judgment for consideration of some point of law arising in the course of the trial. If the trial is by the judge without a jury, he may, in like manner, either give judgment at once, or take time for consideration.

If, on the case being called for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his case so far as the burden of proof falls upon him. If the defendant appears, and the plaintiff does not appear, then the defendant, if he has no counterclaim, may demand judgment dismissing the action. If he has a counterclaim, he may prove it, so far as the burden of proof falls upon him. A verdict or judgment taken by reason of non-appearance at the trial, may be set aside by the Court upon such terms as the Court thinks fit, upon application made within six days after the trial.

EVIDENCE.

Evidence, generally, is documentary or oral. Evidence by affidavit, and by witnesses examined before a commissioner, is only allowed by consent or by order of the Court for a special purpose.

Documentary evidence consists of documents established (a) by admission of the parties, (b) by evidence of witnesses, or (c) by the evidence of the documents themselves, in accordance with law (generally by statutory enactment).

Such are Acts of Parliament (which, strictly, are themselves law rather than evidence), Patents, Proceedings of Government Departments, Records under the custody of the Master of the Rolls, Acts of the Courts of Justice, duly authenticated extracts from the registers of births, deaths, and marriages. The protest made by a notary abroad of a foreign bill of exchange is, for commercial convenience, admitted as evidence. In the case of various public documents, special extracts or certificates are admitted as evidence.

The Documentary Evidence Act, 1845 (8 & 9 Vict. c. 113), has much facilitated the proof of public documents by giving the effect of *prima facie* evidence to a document which *purports* to be authenticated in the way prescribed for the authentication of a public document by any statute then or thereafter to be in force. Thus the proof of the genuineness of a seal or signature required by various statutes for the authentication of a public document is dispensed with, unless proof is offered against the genuineness of the document tendered.

Where a certificate or official copy of a proceeding of a foreign Court of Justice is tendered as evidence, it is, as a rule, necessary to prove by an expert the regularity of the certificate and effect of the proceeding according to the law of the place; and, where the contents of the document are material, to verify in like manner an English translation of the document.

It is not to be supposed that a public document is evidence for all that it may contain. A distinction is made between the facts, the authentication of which is the proper business of the officials issuing the document, and those which merely concern the parties at whose instance the document has been recorded. For example, the fact of death, birth, or marriage, contained in a certificate, is evidence against all the world; but the record of a judgment is merely evidence between the persons who are parties to it.

It is a fundamental rule that evidence is admissible from

the primary source only; so that proof by hearsay, even by repeating a statement made by a deceased person, is (as a general rule) inadmissible. If it is apprehended that important evidence should (pending an action) be lost by death, an order may be made for the evidence to be taken by commission, *de bene esse*, that is to say, so that the record of the evidence may be read at the trial in case the witness should then be dead or incapable of attending to give evidence. If, when the time of trial arrives, the witness is alive and capable of attending, the evidence taken on commission can only be used with the consent of the parties. In certain cases also, where a question regarding title is expected to arise, but the time has not arrived for commencing an action to try it, a special action may be instituted for perpetuating testimony, namely, by examination and cross-examination of witnesses, and recording their testimony, for use only in case of the witnesses being unable to give evidence at the trial of the subsequent action. In every case where evidence is allowed to be used by witnesses not before the Court at the trial, it is essential that the evidence be taken under such conditions that the opposite party has the opportunity of cross-examination. On every application for evidence to be taken out of Court, by commission or otherwise, the Court may prescribe such conditions as are deemed necessary for this purpose.

By consent of parties proof may be taken (for the purpose of trial) by affidavit. In this case, each party has the right to require that the witnesses, who have made affidavits for the opponents, may attend the trial, or appear before a commissioner to be cross-examined.

The practice is different on the application for an interlocutory order. For this purpose, evidence is usually taken by affidavit, without affording the opportunity for cross-examination. But even on such an application the Court has power to order a witness to appear for cross-examination. The frequent use of this power would, no doubt, lead to waste of time; and it is seldom exercised.

JUDGMENT.

Where a judgment is pronounced orally in Court, the formal judgment (unless otherwise ordered) is dated and takes effect as of and from the date when it was pronounced.

Where the trial has taken place with a jury, an application for a new trial may be made on the following grounds: (a) that the judge has misdirected the jury; or (b) that he has improperly admitted or rejected evidence; or (c) that the verdict is against evidence—that is to say, that it could not have been given consistently with an intelligent appreciation of the evidence. The application is usually made to a Divisional Court, consisting of two or more judges of the King's Bench Division of the High Court. A new trial for misdirection, or for improper admission or rejection of evidence, will only be granted if the Court is of opinion that, by reason of misdirection, etc., substantial injustice has been done.

INTERLOCUTORY ORDERS.

Before action is ready for final judgment, it is frequently necessary to obtain an interlocutory order to secure the matter in dispute, or to prevent the defendant, pending the final proceedings, from injuring the rights of the plaintiff. For instance, it may be necessary to prohibit the negotiation, contrary to contract, of a bill of exchange, which, if allowed, would enable a third person to sue upon the bill, without being bound by the contract. Where the object of the action is to prevent the unlawful use of a trade-mark, an interlocutory injunction is frequently obtained upon an application supported by affidavit. So if a building is commenced which, if completed, would obstruct the "ancient light" to which the plaintiff is entitled for the comfortable enjoyment of his house, or where the defendant is manifestly preparing to do that which he has, by express contract, bound himself not to do. It is the general rule that the Courts may, upon interlocutory application, issue an injunction, or make an order for a receiver, whenever

it appears to the Court "just and convenient." This power is exercised, not arbitrarily, but with strict regard to precedents and practice of the Court. In a doubtful question, which cannot satisfactorily be disposed of upon affidavit evidence, the Court may, in its discretion, advance the trial, and in the mean time arrange a *modus vivendi*, by which substantial justice may be assured. This is frequently done by undertakings by the parties or their counsel (having the force of an order of the Court). The Court in such a case will have regard to the intrinsic probabilities of the case. For instance, where the validity of a patent is disputed for want of novelty, the Court, if satisfied of the good faith of the defendant, will not restrain him by injunction from manufacture or sale of the article, but order him to keep an account. But if the validity of the patent has been established in another action, although between different parties, an injunction will be granted upon interlocutory application, the plaintiff undertaking to pay damages, in case, upon the trial, it should be found that the injunction has been wrongly granted.

Where the defendant has charged his property for the satisfaction of a debt or obligation, the plaintiff in an action, for enforcing the charge, may, upon interlocutory application, obtain the appointment of a receiver; on the other hand, there is, speaking generally, no means of obtaining security for a merely personal demand until judgment or final order for payment.

EXECUTION.

Upon the due service of a judgment in accordance with the Rules, the person directed by the judgment to pay money or to deliver or transfer property is bound to obey the judgment without any further demand.

A judgment or order for payment of money may be levied by execution upon the property of the debtor. The procedure is various, in accordance with the procedure of the different Courts before 1875. The various proceedings have this in common, that the officer (generally the sheriff's officer)

acts upon the instructions of the creditor, who is responsible for the legality of the execution. Briefly and technically, the following are the modes of execution: (a) writ of *fiery facias*, by which the sheriff is empowered to seize and sell the personal effects of the debtor; (b) writ of *elegit*, by which the creditor obtains, through the sheriff, a legal title to the land of the debtor; (c) writ of sequestration, which has the effect of an assignment by way of security of the rents and profits of land, as well as the corpus of any personal estate; (d) attachment of the debts owing by a third person to the debtor; and (e) equitable execution by a receiver, who takes possession of any property that cannot be reached by any other mode of execution.

Another remedy of the judgment creditor is to obtain a charging order over the debtor's right and interest in property, which has the effect of hypothecating that right and interest to secure the judgment debt. This form of execution is useful, where the debtor has an eventual right to money held under a trust.

In certain cases which are enumerated in the Debtors Act, 1869 (32 & 33 Vict. c. 62), it is in the discretion of the Court to enforce payment of a debt by imprisonment. The cases are (1) default in payment of a penalty other than a penalty in respect of a contract; (2) default in payment of a sum recoverable summarily before a justice of the peace; (3) default by a trustee when ordered by a Court of Equity to pay a sum in his possession or under his control; (4) default by a solicitor in payment of costs ordered to be paid by him for misconduct as solicitor, or in payment of a sum of money ordered to be paid by him in his character as an officer of the Court; (5) default in payment for the benefit of creditors of income under order of Court having jurisdiction in bankruptcy; and (6) default in payment of sum under an order authorised by the Debtors Act. This last category relates to orders of the County Court in the case of small debts, where it is proved that the debtor has, or has had since the judgment, the means of paying; or where, in the case of an order of the County Court, made under

sect. 122 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), there is by the statute a *primâ facie* presumption (not disproved) that the debtor has or has had the means of paying.

A judgment for the delivery of possession of land can be enforced by writ of possession, which is executed by the sheriff.

Judgments or orders of the Court which are not wholly for the payment of money or possession of land, but require something to be done or not to be done, can be enforced by an order for attachment or by committal to prison. The difference between attachment and committal is that the former is effected by writ issued by leave of the Court (after notice given to the delinquent) and directed to the sheriff; the latter is immediately directed by order of the Court and carried out by the tipstaff. It has been stated that the former is the proper remedy for not doing an act ordered by the Court, and the latter for doing a prohibited act.

Where a judgment or order has been made for something to be done, the Court may—besides or instead of proceedings for contempt against the person disobeying the judgment or order—direct that the act required to be done may be done, so far as practicable, by the party by whom the judgment or order has been obtained, or by some other person appointed by the Court, at the cost of the disobedient person.

On the application of a person entitled to enforce a judgment for payment of money, an order may be obtained for oral examination of the debtor as to his means for satisfying the debt, and for the production of any books or documents.

If, when the sheriff takes possession of goods under an execution, a claim is made in writing by a third person as mortgagee under a bill of sale, or as otherwise entitled to the property, the rights as between the claimant and the execution creditor may be determined on a proceeding called an interpleader, under an order which the Court may make with full discretion as to the terms for securing

the rights of either party until the issue between them may be tried.

APPEALS.

The High Court of Justice itself exercises a certain appellate jurisdiction. In bankruptcy matters an appeal lies from the district registrar to the High Court. The decision of a chief clerk or master may be reviewed by what is, in effect, an appeal to the judge, though the proceeding is called an adjournment. In like manner the decision of a Judge in Chambers may be adjourned, that is to say, the matter is in effect appealed, or reheard, before the Judge in Court. An application for a new trial after the verdict of a jury is made to a Divisional Court, consisting of two or more judges of the High Court. Appeals from inferior Courts are also made to a Divisional Court of the High Court of Justice.

Generally the means of redress for any one who feels aggrieved by a judgment of the High Court is an appeal to the Court of Appeal. If the judgment rests on the verdict of a jury, the Court of Appeal has power concurrently with that of a Divisional Court to order a new trial. If a party feels aggrieved by the decision of a Judge in Chambers (when the case has been fully argued there), he has the alternative, instead of a new hearing before the Judge in Court, to bring the matter before the Court of Appeal; except in the Queen's Bench Division, where the appeal is to a Divisional Court.

Every appeal to the Court of Appeal is, in effect, a rehearing, so that there is nothing to prevent points being insisted on which were not relied on before the Court of first instance; and, under certain circumstances, further evidence may be admitted before the Court of Appeal. In an appeal against an interlocutory order, or in case of evidence discovered since the judgment under appeal, the evidence may be brought forward without special leave; but in general, on an appeal against a final judgment, it is necessary, in order to admit fresh evidence, to obtain special leave on particular grounds.

The time for appealing to the Court of Appeal is (by the Rules since 1893) within three months from the date of the judgment. Appeals from interlocutory orders must, except by special leave, be brought within fourteen days. The time in case of an appeal from an order made in Chambers is from the time when the order was pronounced, or when the appellant had notice of it. In other cases the time runs from the time when the judgment or order is signed or entered, or, in case of the refusal of an application, from the date of the refusal.

An appeal does not operate as a stay of execution, except so far as the Court appealed from or the Court of Appeal may order. An application for any such order must be made, in the first instance, to the Court appealed from. As a general rule, the order staying execution is made upon the terms of defendant paying the money, the plaintiff giving security for repayment, and upon payment of the costs to defendant's solicitor, on his undertaking for repayment.

COSTS AND SECURITY FOR COSTS.

Generally the costs of proceedings in the Supreme Court are in the discretion of the Court or Judge before whom the proceeding is taken, and, except by leave of the Court or Judge, no appeal lies from the order as to costs. This is subject to the proviso that an executor, administrator, trustee, or mortgagee, who has acted reasonably, shall not be deprived of the costs out of the estate, to which he would have been entitled according to the practice of the old Court of Chancery; and also that, where an action or issue is tried with a jury, the costs shall follow the event, unless the Court or Judge, for good cause, otherwise orders. Where these provisos apply, or where the order as to costs involves a principle, then an appeal from an order as to costs will lie.

If the plaintiff in an action has his usual residence abroad, he may be ordered to give security for the costs of the action: and it is no reason for refusing the order that the

plaintiff at the time of the commencement of the action, or at any time afterwards, is temporarily resident within the jurisdiction.

The application that the plaintiff give security for costs is made by the defendant after appearance to the action; and in summary proceedings upon a writ specially indorsed, the defendant is only entitled to the order if he has obtained from the Court leave to defend the action. The security is taken from two responsible persons becoming bound for such amount as the Court or Judge may order. The plaintiff's solicitor is not accepted as a surety.

For the taxing of costs there are, according to regulation, two scales, the one (lower scale) for ordinary cases, the other (higher scale) for especially difficult or important proceedings.

The taxing officers of the Supreme Court have a wide discretion in settling the charges for costs, as well between the parties as between solicitor and client. Their powers are, in effect, judicial; they can inspect the documents and hear the persons concerned upon oath.

The difference between the costs to which a solicitor is entitled against his client, and those which are allowed as between party and party to an action, lies not so much in the amount of the particular charges, as in the circumstance that the solicitor is entitled to charge his client for many services for which the opponent cannot be made to pay. So, for instance, there are fees for conferences and correspondence, especially before the commencement of an action, for which the solicitor is entitled to be paid by his employer, but which cannot be demanded from the opponent. Retaining fees—to engage beforehand the services of an eminent counsel—cannot be charged between party and party; nor can *special fees*, which are demanded by certain counsel whose services are much sought after, be charged—so far as they exceed an ordinary fee—between party and party. But in both cases the solicitor, who, in a reasonable exercise of his discretion, pays such fees, can recover them from his client.

A person who feels aggrieved by the decision of a taxing officer may, within the prescribed time, upon specifying the items and grounds of his complaint, demand a revision of the taxation. And on this being regularly done, and on the taxing master giving his final certificate, the specified items may be brought up for the decision of the Judge.

The Court of Appeal may order the appellant to give security for the costs. The grounds on which this may be required differ from those on which a plaintiff in the original action may be required to give security; and it is usual to make the order, when it is shown by affidavit that the appellant had not the means of paying the costs. The amount of security required is stated in the order. In the case of an appeal against an ordinary interlocutory order, the sum of £20 is frequently named.

ARREST OF A DEFENDANT ABOUT TO LEAVE ENGLAND.

Formerly the plaintiff in an action for debt in the Superior Courts of Common Law had the right to obtain, upon "mesne process," the arrest of the defendant, and hold him to bail, that is to say, until he gave security to appear, and, in certain cases, to satisfy judgment in the action. The proceeding was abolished by the Judgments Act, 1838 (1 & 2 Vict. c. 110); but it was at the same time enacted, that in cases in which formerly the defendant could be arrested, the plaintiff, upon affidavit that he had good ground of action for £20 or more, and that there was probable cause for believing that the defendant was about to leave England unless he were forthwith apprehended, might obtain a special order for his arrest until he should give security according to the former practice. Under this law, a defendant who had his residence in Ireland, and, during a stay in Scotland, had contracted a money debt, might be arrested while passing through England on his way home, and detained until he gave security. The enactment of the statute of 1838 was repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869 (32 & 33

Vict. c. 83), which came into operation simultaneously with the Debtors Act, 1869 (32 & 33 Vict. c. 62). By sect. 6 of the last-mentioned Act it is enacted as follows:—

“Where the plaintiff in an action in any of Her Majesty’s Superior Courts of Law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge of one of those courts, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the court.

“Where the action is for a penalty or sum in the nature of a penalty other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison.”

It has been repeatedly held that the words “that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action” apply only to the case where the plaintiff requires the presence of the defendant for the purpose of evidence, and are not satisfied by the suggestion that the defendant, by leaving England, may render it difficult for the plaintiff to realise the fruits of his judgment. So that the affidavit in a case under the former branch of the

section should disclose the facts which the plaintiff requires the defendant to prove; and if he agrees to admit those facts on the trial, the order for his arrest will not be made. But where there is probable reason for believing that a debtor is about to go abroad *with a view of avoiding payment of the debt*, etc., he may be arrested on an application under the Absconding Debtors Act, 1870 (33 & 34 Vict. c. 76), after issuing a summons under sect. 7 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71).

APPEAL TO THE HOUSE OF LORDS.

Against the judgment of the Court of Appeal there is generally an appeal to the House of Lords. Appeals are now heard, according to the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), by not less than three of the following persons (in the Act called "Lords of Appeal"), namely, (1) the Lord Chancellor, (2) the "Lords of Appeal in Ordinary" appointed as in the Act mentioned, and (3) such Peers of Parliament as are, for the time being, holding, or have held, high judicial office, as described in the Acts. And by the practice and tacit agreement of members of the House, which is now uniformly observed, no Peers other than those described as above take part in the hearing of appeals. By sect. 8 of the Act of 1876, the House of Lords may sit for the purpose of hearing and determining appeals, during any prorogation of Parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of Parliament; and (by sect. 9) upon a dissolution of Parliament, the King may by sign-manual authorise the Lords of Appeal, in the name of the Lords, to hear and determine appeals during the dissolution of Parliament.

The appeal to the House of Lords is commenced by a petition which must be signed by two counsel. Except in the case where the appellant is *in formâ pauperis*, which may be allowed by the House on special petition, with certificate by two counsel, that there are good grounds for

the appeal; the appellant must give security for costs by his own recognizances for £500 and two responsible sureties for £200 each, otherwise he must pay into the fee fund of the House £200.

To assist the hearing, printed cases are lodged containing statements of the facts and points of law on which the parties rely, with an appendix of the material portions of the documents in evidence.

The award of costs is entirely in the discretion of the House, and it is not usual to hear any argument upon costs, but the general practice is to award costs to the successful party.

JUDGMENTS OF FOREIGN COURTS.

Judgments of foreign Courts are, as such, not enforced in England. But a judgment for payment of a certain sum of money is *primâ facie* evidence of a liquidated debt of that amount. Whether the evidence is conclusive, has been questioned. The better opinion appears to be that if the defendant has, before the foreign Court, taken any step which, according to the principles of that Court, is equivalent to appearance, the judgment is conclusive between the parties; and the defendant, if the matter comes to be tried before an English Court, cannot raise any defence, which he has not, or has vainly, raised before the foreign Court. And even if the defendant has not appeared before the foreign Court,—if it is shown that the question was within the competence of the foreign Court according to a principle which is recognised by English Courts, and is not a merely arbitrary law in force in the foreign country, and that the defendant was properly summoned according to the rules of the foreign Court, and had actual knowledge of the proceedings, and finally that the judgment was regular according to the foreign law, then the Courts in England will treat the judgment of the foreign Court as conclusive, and will give judgment in the plaintiff's action here accordingly.

By the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), a judgment of a Superior Court obtained in one part

may be executed in another part of the United Kingdom, after it has been registered there for execution. So a judgment of the High Court of Justice in England may be registered for execution in Scotland or Ireland and executed there, and *vice versâ*. The registration for execution in the other part of the United Kingdom must follow within a year of the judgment, otherwise it must be done with leave of the Supreme Court of that part of the United Kingdom where it is to be enforced.

CHAPTER L.

PROCEDURE IN BANKRUPTCY.

BANKRUPTCY law in England is entirely created by statute. By the common law there was no means for an insolvent to escape imprisonment for debt; nor was there any proceeding for the fair distribution of his property among creditors. It was difficult for a creditor to make the immoveable property of the debtor available for payment of his debt. As to the moveable property, the creditor who first took possession under a writ of execution held the advantage over other creditors. In default of available property, the creditors could hold the person of the debtor in prison, without the means of release.

Privilege of Parliament gave an exceptional protection; and the last resource of a gentleman pressed by his creditors was to be returned as representative for a borough under the influence of a patron. Such members were very useful to the party of the patron, as their votes could be absolutely relied on.

There have been various statutes for the relief of insolvent debtors, which are now superseded by the Debtors Acts of 1869 and 1878 (32 & 33 Vict. c. 62, and 41 & 42 Vict. c. 54). The earlier statutes relating to bankruptcy had for their object the means of securing for distribution among

creditors the property of persons evading the ordinary process of legal execution. This object has been combined in later Acts with provisions for discharge of the bankrupt who has complied with the provisions of the Acts. Such provisions were at one time only extended to merchants, but in the Acts now in force (see p. 269, *ante*) no distinction is made between merchants and other persons.

The proceedings in bankruptcy rest upon what is termed in the statute an "act of bankruptcy" (see p. 270, *supra*).

A bankruptcy petition may be presented by one or more creditors in one or more liquid debts amounting to £50, within three months after the debtor, who is domiciled in England, or who, within a year, has ordinarily resided, or has had a dwelling-house or place of business in England, has committed an act of bankruptcy. A secured creditor must offer to give up his security for the benefit of the creditors, or must value his security, in which case he is only admitted as a petitioning creditor for the balance. The petition must be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and must be served in the prescribed manner; and, at the hearing of the petition, the debt, the service of the petition, and the act of bankruptcy must be proved.

The Court, if satisfied with the proof, may make a receiving order. If not satisfied with the proof of the debt, or of the act of bankruptcy, or of the service of the petition; or if satisfied by the debtor that he is able to pay his debts, or that for any other cause no order ought to be made, the Court may dismiss the petition.

A bankruptcy petition may also be presented by the debtor himself, and, as already seen (p. 271, *supra*), the presentation of such a petition is itself an act of bankruptcy. A debtor's petition must allege that the debtor is unable to pay his debts, and the petition cannot be withdrawn without leave of the Court.

On the making of a receiving order an official receiver is constituted receiver of the debtor's property, and a creditor cannot proceed with any action without the leave of the

Court; but this does not prevent a secured creditor from realising his security.

Notice of the receiving order must be gazetted and advertised in a local paper in the prescribed manner.

The receiving order is followed by a general meeting of the creditors. The debtor has to make out, in the prescribed form, a statement of his affairs; and if he fails to do so without reasonable excuse, he may be adjudged bankrupt.

At the first meeting of creditors an agreement for a composition or scheme of arrangement may be determined on. This agreement is binding on the creditors if confirmed by a resolution passed by a majority in number of the creditors, representing three-fourths in value of the debts proved, and approved by the Court. The Court may, before approving of the composition, hear a report of the official receiver, and any objections made by any creditor; and if the Court does not consider the composition or scheme reasonable, the Court may refuse to approve of it.

If no composition or scheme is accepted and confirmed as above, or if the creditors at the first meeting, or any adjourned meeting, by ordinary resolution resolve that the debtor be adjudged bankrupt, the Court adjudges the debtor bankrupt; and thereupon the property of the debtor becomes divisible amongst his creditors and vests in a trustee, who is either appointed by resolution of the creditors, or may be left to be appointed by the committee of inspection appointed by the creditors. Failing such appointment, a trustee may in the mean time be appointed by the Board of Trade.

Notice of the order adjudging the debtor bankrupt is gazetted and advertised in the prescribed manner.

A composition or scheme may, soon after the adjudication, be entertained upon a special resolution of the creditors; and the Court may, if it approves of the composition or scheme, make an order annulling the bankruptcy, and vesting the property of the bankrupt in him or such other person as the Court may appoint on such terms and conditions,

if any, as the Court may declare. But if default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears that the approval of the Court was obtained by fraud, or that the composition cannot be carried out without injustice or delay, the Court may adjudge the debtor bankrupt and annul the composition or scheme without prejudice to any sale or disposition that has taken place in pursuance of the composition or scheme.

DISCHARGE OF THE BANKRUPT.

The bankrupt may, at any time after the adjudication, apply for an order of discharge, and the Court may appoint a day for hearing the application. The hearing is in open Court, and does not take place until after the public examination of the bankrupt is concluded. The Court is bound to refuse the discharge if it appears that the debtor has committed any of the fraudulent practices described as misdemeanours in Part II. of the Debtors Act, 1869; and to suspend the order of discharge, or only grant the order conditionally in such cases of recklessness or negligence as are specified in the Act.

The discharge releases the debtor from all debts and obligations except (a) Crown debts, unless with consent of the Treasury; (b) debts or liabilities incurred by fraud or fraudulent breach of trust.

PROOF OF DEBTS.

Debts provable in bankruptcy comprise all debts and liabilities to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any liability incurred before the date of the receiving order—with these exceptions: *i.e.* except (1) demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust; or (2) debts incurred by the debtor after an act of bankruptcy to a creditor who has notice of the act of bankruptcy.

Mutual debts between the debtor and the creditor claiming to prove under a receiving order may be set-off; but a person shall not be entitled to claim a set-off against the property of the debtor if he had, at the time of giving credit, notice of an act of bankruptcy committed by the debtor and available against him.

Certain classes of debts, including rates and taxes for the year preceding the receiving order, and wages of clerks or servants, labourers or workmen, are payable in priority to other debts.

In the case of partners the joint estate is applicable in the first instance to payment of the joint debts, and the separate property of each partner in the first instance in payment of his separate debts. With these exceptions all debts proved in the bankruptcy are payable *pari passu*.

REALISATION AND DIVISION OF THE PROPERTY.

It is the duty of the trustee, as soon as possible, to take possession of the property of the bankrupt, and of all deeds, books, and documents of the bankrupt.

Subject to the provisions of the Act, the trustee may sell and deal with the property as the bankrupt might have done. With the permission of the committee of inspection, he may do all or any of the following things: (1) carry on the business; (2) take any legal proceeding; (3) employ a solicitor or other agent; (4) accept the price of property sold by instalments, to be secured as the committee think fit; (5) mortgage or pledge any part of the property; (6) refer any dispute to arbitration; (7) make any compromise with creditors; (8) make any compromise or arrangement of any claims relating to the property; (9) divide *in specie*, and upon valuation, any property which cannot conveniently be sold.

Subject to the retention of such sums as are necessary for the costs of administration, the trustee is, with all convenient speed, to declare and distribute dividends to the creditors who have proved their debts.

When the trustee has realised all that can be realised

without needlessly protracting the trusteeship, he is to declare a final dividend. This must be after due notice to creditors to send in and establish their claims within a time fixed. On the expiration of the time fixed, or such extended time which the Court may allow, the division may be made amongst the creditors, who have proved their debts, without regard to the claims of any others.

The bankrupt is entitled to any surplus remaining after payment in full of all his creditors with interest, and the costs of the proceedings.

INSOLVENT ESTATES OF DECEASED PERSONS.

By the Bankruptcy Act, 1883, provision is made for administration of the estate of a deceased person according to the law of bankruptcy. The proceedings may be commenced by a creditor's petition, upon which an administration order may be made which has the effect of vesting the property in the official receiver of the Court, who is to realise and distribute the property according to the rules of bankruptcy, so far as they are applicable.

The administration order is not made until the expiration of two months from the date of the grant of probate or administration, unless the petitioning creditor proves that the deceased debtor committed an act of bankruptcy within three months of his decease. If proceedings for administration of the estate have already been commenced in the Chancery Division of the High Court (or in the County Court, under the jurisdiction conferred on it by sect. 67 of the County Courts Act, 1888), a creditor's petition cannot be presented under the Bankruptcy Act; but on proof that the estate is insufficient to pay its debts, the Court may transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon an order may be made having the like effect to an administration order made on a creditor's petition.

The effect of all this was to abolish, in regard to insolvent estates, the unequal rule which formerly prevailed

in an administration of the estate in Chancery, whereby a secured creditor could realise his security for what it was worth, and be admitted besides, *pari passu* with the unsecured creditors, to a dividend in respect of his entire debt.

CHAPTER LI.

MODERN RULES AS TO THE ADMINISTRATION OF THE REAL AND PERSONAL ESTATE OF A DECEASED.

THE differences which formerly existed between real and personal estate are now, for the purposes of administration—that is to say, of completing a title, paying funeral expenses and debts, the duties payable to the Government, and costs of administration, before the estate comes to the hands of the persons ultimately entitled—reduced within narrow limits.

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65) (a), which applies to the estates of all persons dying after the 1st of January, 1898, enacts (by sect. 1) that where real estate is vested in any person, without a right in any other person to take by survivorship, it devolves and becomes vested (notwithstanding any testamentary disposition) in his personal representative from time to time as if it were a chattel real—*i.e.* just as leasehold property would devolve. This applies to any real estate over which the deceased had a general power of appointment, but it does not apply to land of copyhold or customary tenure where an admission or act by the lord of the manor is necessary to complete the title of a purchaser from the customary tenant.

By sect. 2 of the same Act the personal representative is to hold the land as trustee for the persons beneficially entitled, and, upon request, is bound to convey the land accordingly. This is subject to (*inter alia*) the following:—
“The real estate shall be administered in the same manner,

(a) See also pp. 181, 217, *supra*, where the effect of this Act has been referred to.

subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate ; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liabilities of real estate to be charged with the payment of legacies."

It is therefore still the ordinary rule that the real estate is not resorted to for the payment of debts, unless the personal estate is found insufficient ; but the executor or administrator has the right and title, if necessary, to sell and apply the real estate for the payment of debts ; and it is not necessary for this purpose that there should be any order in the nature of a judgment for administration made by the Court in its jurisdiction as a Court of Equity.

By the Finance Act, 1894 (57 & 58 Vict. c. 30), estate duty is levied upon the value of the estate, whether real or personal, passing on the death of the deceased, and the succession duty, which is further payable by the person succeeding (beneficially) to the real estate, is payable (if that person is competent to dispose of the estate) upon the fee-simple value. So that the succession duty, which previously was calculated upon a life interest only, is substantially assimilated to the legacy duty, which was originally imposed by the Legacy Duty Act, 1796 (36 Geo. III. c. 52). In respect of duties, there remain only differences in the mode of collection, namely, (1) that in the case of real estate the person accountable for the duties is not necessarily the executor, but (where the duty is not paid by the executor) is the person from time to time beneficially entitled ; and (2) that the duty payable upon real estate may be paid by half-yearly instalments spread over a period of eight years, interest being calculated and payable from the date when the first instalment is due.

The affidavit made by the person applying for the grant of probate or administration, must set forth, to the best of his knowledge and belief, the particulars and value of the

property according to a form furnished by the Inland Revenue authority. The affidavit, if the death was after the 1st January, 1898, sets forth the real estate to become vested by the grant, in accordance with the Act of 1897. The duties are levied according to the value of the property as it appears on the affidavit, after setting off the debts contained in the schedule. If it is subsequently ascertained that the value of the property is less or more than the valuation given by the affidavit, there will be a further duty, or, as the case may be, a repayment. On delivering the affidavit, the executor (or administrator) must pay the estate duty in respect of all personal property of which the deceased was competent to dispose, and he may pay, in like manner, the estate duty in respect of any other property passing on the death which, by virtue of any testamentary disposition of the deceased, is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty request him to pay it. So far as not paid by the executor, the estate duty is collected upon an account setting forth the particulars of the property, and delivered to the Commissioners of Inland Revenue by the persons accountable for the duty. The rates of estate duty are according to a scale of percentage mounting up from £1 per cent. on a property between £100 and £500, to £8 per cent. where the property exceeds £1,000,000.

If the will to be established is that of a foreigner, and if it is proved that the will is good according to the law of the place of domicile of the testator, the Court will award probate in England. The production of an authenticated transcript of an order of the Court of the domicile will be received as sufficient evidence.

If the will is that of a British subject, probate may be granted so far as relates to the personal estate if the will satisfies the requirements as to form, either of the place of execution, or of the place where the testator was domiciled at the time of his death; or (if executed out of the United Kingdom) of the place where the testator was domiciled

at the time of the execution, or of that part of the United Kingdom where he had his domicile of origin.

If an inheritance, whether of real or personal estate, is, through default of a person having a legal title, in danger of being lost or diminished, a creditor, or other person having a presumable interest, may obtain protection for the property by an order for a receiver, or, if necessary, a receiver and manager. The application may be made in the Chancery Division, which exercises the jurisdiction formerly belonging to the Court of Chancery to give protection to property in danger of being lost or dispersed for want of proper legal custody or ownership. The person appointed receiver must give security according to the nature and value of the property ; and if he is also appointed manager (as may happen where the property consists of a going business), it must be shown how the resources immediately required are to be provided. The Court may, and frequently does, give the management to the applicant on his undertaking the responsibility.

If a receiver is appointed for real estate, the Court will at the same time direct an inquiry who is the heir, and the costs of the inquiry will fall upon the estate.

Formerly the Court of Chancery exercised an extended jurisdiction over the administration of the property—real and personal—of a deceased person. Under the direction and orders of the Court, possession was taken, the debts paid, real estate (if necessary) sold, and the proceeds distributed. This jurisdiction, though sometimes usefully employed in the case of considerable estates, led to great abuses in cases where the costs to be paid out of the estate became altogether disproportionate to the results to be obtained by the proceeding. By the Judicature Acts, and the existing rules, the Court has full discretion to refuse to make an order for general administration, and will only burden the inheritance with the costs of such an order in a case where it appears necessary or of great utility. When the Court does exercise its jurisdiction to make an order for general administration, then every important act of

administration requires an order of the Court; the money collected from time to time is paid into Court, and distributed according to the orders of the Court. Most frequently the Court, instead of making an order for administration by the Court, orders merely the taking of accounts before the Court. Such an order, and the procedure following upon it, exercises an important influence upon the correct action of executors and administrators; and, besides, provides for the executor a protection similar to the *beneficium inventarii* of other systems of law.

In case of the death of a person who has not by will disposed of his personal estate, the English law, as well in the issue of letters of administration as in the distribution of the estate, follows the law of the domicile. By English law the rules are as follows:—

The widow has, according to the Statute of Distributions (22 & 23 Car. II.), if the intestate deceased has left a child or children, a right to one-third of the estate, the rest going to the children. If he has left no child, the widow has a right to one-half, the other half falling to the next-of-kin. This is all that remains of the rights of the widow and children, who, in earlier times, had, by the law of England as well as by that of Scotland and other countries, rights overriding any testamentary disposition. How those rights disappeared in England is not very easy to trace (*a*); it is sufficient to say that the absolute power of disposition by testament, both over real and personal estate, has long been established as the general rule, the survivals of the ancient law being ascribed to local customs. These so-called local customs were from time to time abolished by statute, the last (that of the City of London) in the year 1724 (11 Geo. I. c. 18, s. 17).

Where the estate to be administered is the separate estate of a married woman, the husband has, in case of intestacy, a preferential right both to the grant of administration and to the beneficial property, as already explained (p. 285, *supra*). The rights of children of an intestate widow in

(*a*) See this discussed more at length, p. 275, *et seq.*, *supra*.

their mother's estate are similar to those of a widower in their father's estate; and so are the rights of next-of-kin.

ULTIMUS HÆRES.

On the death of a bastard unmarried and intestate, his personal estate goes to the Crown as *ultimus hæres*. On this being shown to the authorities, a grant is frequently made, on payment of the expenses and a deduction in lieu of duty, to the person pointed out by the quasi-relationship, or by the presumptive wishes of the deceased, as the person to receive it. The grantee is bound to administer the estate, and is entitled, under the obligation of paying the debts, to the benefit of the residue.

Real estate to which a bastard (who can only have acquired by purchase) is entitled falls, in default of issue, by escheat to the Crown or other lord of the fee (see p. 189, *supra*). Where it escheats to the Crown, the Crown may make a grant under 59 Geo. III. c. 94.

PART V.—*CRIMINAL LAW AND PROCEDURE.*

INTRODUCTORY.

CRIMES GENERALLY.—OFFENCES OF A PUBLIC NATURE.

CRIME has been briefly described as a public wrong. Some crimes consist in acts which are offences against the public generally: others in acts which primarily are injuries to individuals, but become criminal by reason of their tendency to public mischief, or to disturb the public tranquillity, that is—to use the common language of an indictment—they are committed “against the peace of our Lord the King his Crown and Dignity.” This applies to all offences at common law. An act which may, or may not, be an offence at common law, may also be made an offence or crime by statute; and in such a case the act intentionally done, is itself a crime.

Crimes, according to English law, fall under three large classes—*Treason*, *Felony*, *Misdemeanour*. These are distinguished first as to the nature of the act; and, secondly, as to procedure and punitive consequence.

Treason is an act directed against the King, or the Sovereign Government itself. Such acts are defined by statute, and a body of case law founded upon statute. By a natural division of the subject, treason may be classed (a) as (1) the execution or contrivance of acts of violence against the person of the Sovereign; (2) acts of treachery against the State in favour of a foreign enemy; and (3) acts of violence against the internal government of the country.

(a) See Sir James F. Stephen, “Criminal Law,” p. 113 (ed. 1863).

Besides the death penalty, a conviction for treason, before the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), involved forfeiture. This Act abolished forfeiture for treason as well as for felony, but made provision instead for the administration of the estate of the convict, and its application to the purposes mentioned in the Act.

The distinction between *felony* and *misdemeanour* formerly had the consequence that felony involved forfeiture; but misdemeanour did not. Felony still involves the consequences that an administrator may be appointed for the purposes of the Forfeiture Act, 1870.

A further consequence of the distinction between felony and misdemeanour is that the facilities for arresting a felon are greater than those for arresting a misdemeanant.

As to procedure, the principal differences are that a felon is generally tried upon an indictment; though he may also, where an inquest has been held by the coroner, and a verdict of murder or manslaughter found by the jury, be arraigned upon the inquisition, which is equivalent to the finding of a grand jury upon a bill of indictment. Misdemeanants may be proceeded against by information. Persons accused of felony enjoy the right of peremptory challenge. Misdemeanants do not. In general, a trial for misdemeanour much resembles the trial of a civil action for tort (a).

In what follows, the technical division—*Treason, Felony, Misdemeanour*—is subordinated to the following more natural division.

Crimes may be divided into two great classes—namely, *first*, those of a public nature, that is to say, offences in the prosecution of which all His Majesty's subjects have an equal interest; and *secondly*, those committed against individuals, that is to say, offences in the prosecution of which one or more individuals are primarily concerned.

(a) See Sir James F. Stephen, "Criminal Law," p. 107 (ed. 1863).

I. OFFENCES OF A PUBLIC NATURE.

These may again be classed as follows :—

1. TREASON (including what has been called TREASON-FELONY).
2. OFFENCES AGAINST THE CROWN AND GOVERNMENT, which are now not dealt with as treason.
3. OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP.
4. OFFENCES AGAINST PUBLIC JUSTICE.
5. OFFENCES AGAINST THE PUBLIC PEACE.
6. OFFENCES AGAINST PUBLIC TRADE.
7. CONSPIRACY.
8. OFFENCES AGAINST PUBLIC MORALS, PUBLIC SAFETY, AND, GENERALLY, PUBLIC WELL-BEING.

CHAPTER LII.

TREASON (INCLUDING TREASON-FELONY).

1. AND first, of *Treason*.

The fullest description of treason in an early work which has been recognised as an authority in English law, is that of Bracton. Much of his description is suggested by expressions in the Roman law, founded on the *Lex Julia Majestatis* (a).

“The crime of high treason (*læsa majestas*),” he says, “has under it many species, of which one is, as if any one by a rash daring should compass the death of our Lord the King, or shall have done anything or promised anything to be done for the sedition (b) of the King or his Army, or has afforded aid and counsel or consent to those promising the same, although they have not carried into execution what they had in intention.” The description further goes on to enumerate such crimes as forgery, etc., which, by modern statutes, are made felonies.

(a) *Dig.*, xlviii. 4.

(b) Or, by a various reading, “seduction.”

Bracton's description of treason falls far short of being a definition. The actual practice of the law, at his time and subsequently, involved the nature of the crime in still greater uncertainty. In order to remedy this uncertainty, the Treason Act, 1351 (25 Edw. 3. stat. 5, c. 2), laid down the conditions under which an act was to be accounted treason.

This statute is entitled "A declaration which offences shall be adjudged treason"; and the most important conditions, so far as relates to political offences, are laid down as follows: "When a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be proveably attainted of open deed by the people of their condition." The rest of the statute relates to various offences which are less directly of a political character.

This celebrated statute, as interpreted by numerous cases, is the foundation of what is sometimes called treason at common law, by way of distinction to the statutory crime, sometimes called treason-felony, constituted under the Treason Felony Act, 1848 (11 Vict. c. 12).

The scope of the statute of Edw. 3., and particularly the construction of the expression "compassing the King's death," was gradually extended by judicial interpretation embodied in writings of recognised authority, such as those of Hale and Foster, to cover all acts of violence, or inciting to acts of violence against the established government; but in the course of the eighteenth century great difficulty was found in persuading juries to give effect to this extended interpretation. And towards the end of the eighteenth century was passed the Treason Act, 1795 (36 Geo. 3. c. 7), embodying by express enactment most of the constructions which had been thus put upon the older Act. This Act of 1795,

which extended only to the end of the then present reign, was made perpetual by the Treason Act, 1817. (57 Geo. 3. c. 6). Both these Acts left in force the provisions of the Act of Edw. 3.

In 1848 the question arose of prosecuting persons for acts committed in Ireland, which would have come within the express provisions of the Acts of Geo. 3., but could not be brought within the Act of Edw. 3. without the aid of the extended interpretation. It was then found that, as the Act of 1795 was passed during the period when Ireland had an independent Parliament, it was, to say the least, doubtful whether the Acts of Geo. 3. could be applied to offences committed in Ireland; and this led to the Treason Felony Act, 1848 (11 Vict. c. 12), which created the crime commonly called "treason-felony."

This Act (by sects. 1 and 2) repealed the enactments of the statutes of Geo. 3. except such as related to death of or bodily harm to the person of the reigning sovereign, and enacted that the provisions of those Acts, so far as not repealed, should extend to Ireland.

And (by sect. 3) it was enacted "that if any person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most Gracious Lady the Queen, Her Heirs or Successors, from the Style, Honour, or Royal Name of the Imperial Crown of the United Kingdom, or of any other of Her Majesty's Dominions and Countries, or to levy War against Her Majesty, Her Heirs or Successors, within any part of the United Kingdom, in order by Force or Constraint to compel Her or Them to change Her or Their Measures or Counsels, or in order to put any Force or Constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any Foreigner or Stranger with Force to invade the United Kingdom or any other Her Majesty's Dominions or Countries under the Obeisance of Her Majesty, Her Heirs or Successors, and such Compassings, Imaginations, Inventions, Devices, or Intentions, or any

of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt Act or Deed, every person so offending shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to [Penal Servitude] (a) for the Term of his or her natural life, or for any term not less than Seven Years, or to be imprisoned for any term not exceeding Two Years, with or without hard labour, as the Court shall direct."

By sect. 6 it was provided that nothing therein contained should lessen the force of or in any manner affect anything enacted by the statute of Edw. 3.

Under the proviso in sect. 6, a government still retains the power of prosecuting, on what is called treason at common law, an act which comes under the extended interpretation of the statute of Edw. 3.; but where the act is within the express provisions of the Act of 1848, the course of prosecution for treason-felony under the latter statute is likely to be followed.

CHAPTER LIII.

2. OFFENCES AGAINST THE CROWN AND GOVERNMENT NOT NOW DEALT WITH AS TREASON.

REVERTING to the arrangement on p. 506, *supra*, the next class of crimes is—

2. *Offences against the Crown and Government not now dealt with as Treason.*

There are various offences directed against the Crown or Government, some of which were punishable as treason under the statute of Edw. 3., but which are now dealt with exclusively under the provisions of modern statutes.

(a) See the Penal Servitude Act, 1857 (20 & 21 Vict., c. 3), s. 2. The specially revolting accompaniments to the execution of a sentence for high treason were finally put an end to by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 31.

Such offences may be classed as follows —

- (a) *Attempts to injure or alarm the person of the King (or Queen Regnant).*
 - (b) *Offences against the Foreign Enlistment Act, 1870.*
 - (c) *Forging the King's seal.*
 - (d) *Coinage offences.*
 - (e) *Sedition and seditious libel.*
 - (f) *Administering unlawful oaths.*
 - (g) *Inciting to mutiny.*
 - (h) *Illegal training and drilling.*
 - (i) *Offences relating to public stores.*
 - (j) *Disclosure of official secrets.*
 - (k) *Offences by and relating to public executive officials.*
 - (l) *Concealment of treasure trove.*
 - (m) *Offences against the public revenue.*
- (a) *Attempts to injure or alarm the Person of the King (or Queen Regnant).*

These are made high misdemeanours under the Treason Act, 1842 (5 & 6 Vict. c. 51).

- (b) *Offences against the Foreign Enlistment Act, 1870*
(33 & 34 Vict. c. 90).

By this Act such offences are made punishable by fine and imprisonment, or either of them, according to the Statute.

- (c) *Forging the King's Seal.*

This was treason under the statute of Edw. 3.; but is, with certain cognate offences, made felony under the Forgery Act, 1861 (24 & 25 Vict. c. 98, s. 1).

- (d) *Coinage Offences.*

Many of such offences were treason under the Act of Edw. 3. Under the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), most of these offences are made felony; but some, such as the simple uttering of counterfeit coin, and

counterfeiting foreign coin, are made misdemeanours; and some, such as tendering defaced coin (sect. 17) and having in possession more than five counterfeit gold or silver coin (sect. 23), are punishable by penalties as well as forfeiture of the coin.

(e) *Sedition and Seditious Libel.*

By an Act of 1661 (13 Car. 2. stat. 1, c. 1, s. 3) it is enacted that if any person or persons shall maliciously and advisedly, by writing, printing, preaching, or other speaking, express, publish, utter, declare or affirm (*inter alia*) that both Houses of Parliament, or either House of Parliament, have or hath a legislative power without the King, or words to that effect, every such person or persons shall incur the danger and penalty of a *præmunire* mentioned in a statute of Richard 2. (16 Rich. 2. c. 5). The prosecution must be by order of the King in Council, and within six months after the offence committed, and the indictment within three months of prosecution.

By the Succession to the Crown Act, 1707 (6 Anne c. 41), it is made criminal maliciously, etc., to declare that any person has right to the Crown otherwise than in accordance with the Acts of Settlement and the Act of Union; or that the King or Queen, with the authority of Parliament, have not authority to limit the succession of the Crown. If the declaration was made by writing or printing, the crime was made high treason; if by speaking only, it incurred the penalty of *præmunire*. But there was to be no prosecution for spoken words unless information is laid within three days of the words spoken.

By the Criminal Libel Act, 1820 (60 Geo. 3. and 1 Geo. 4. c. 8), it was enacted (sect. 1) that where a verdict or judgment in default should be had against any person for composing, printing, or publishing any blasphemous libel, or any criminal libel tending to bring into hatred or contempt the person of the King, or the Government and Constitution of the United Kingdom as by law established,

or either House of Parliament, or to excite His Majesty's subjects to attempt the alteration of any matter in Church and State as by law established otherwise than by lawful means, the Court or Judge may make an order for the seizure of all copies of the libel in the possession of that person, and upon a second conviction of such an offence, the person may be adjudged to suffer punishment as in the case of high misdemeanour, or be sentenced to banishment.

(f) *Administering Unlawful Oaths.*

By the Unlawful Oaths Act, 1797 (37 Geo. 3. c. 123), it is a felony to administer or to aid, or be present consenting to, the administering of an oath purporting to bind the person taking it to engage in any mutinous or seditious purpose, or to disturb the public peace, etc. It is also felony for any person to take such an oath, unless compelled thereto, and within four days declaring, by information before a magistrate, that he was so compelled.

By the Unlawful Oaths Act, 1812 (52 Geo. 3. c. 104), similar provisions are made as to the administering and taking of an oath purporting to bind the person taking the same to commit treason, or murder, or any felony.

(g) *Inciting to Mutiny.*

By the Incitement to Mutiny Act, 1797 (37 Geo. 3. c. 70), it is enacted that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces by sea or land from his or their duty, or to incite such person or persons to commit any act of mutiny, shall, on being legally convicted, be adjudged guilty of felony.

(h) *Illegal Training and Drilling.*

By the Unlawful Drilling Act, 1819 (60 Geo. 3. and 1 Geo. 4. c. 1), all meetings and assemblies of persons for the purpose of training or drilling to the use of arms, or for the purpose of practising military exercise, without lawful

authority from His Majesty, or the Lieutenant, or two justices of the peace, are declared illegal; and every person present for the purpose of training and drilling any other person is liable to transportation for not exceeding seven years or imprisonment not exceeding two years, and every person present for the purpose of being drilled is liable to punishment by fine and imprisonment not exceeding two years. The prosecution must be commenced within six calendar months after the offence committed.

(i) *Offences relating to Public Stores.*

By the Public Stores Act, 1875 (38 & 39 Vict. c. 25, s. 5), it is made felony to obliterate, with intent to conceal His Majesty's property in any stores, the distinctive Government mark upon them. By sect. 13 the provisions do not apply to stores issued as regimental necessities to a soldier.

By the Army Act, 1881 (44 & 45 Vict. c. 58, s. 156), every person who receives from a soldier arms, ammunition, equipments, instruments, regimental necessities, etc., is liable to a fine for the first offence, and fine or imprisonment for a subsequent offence; but articles which are public stores within the meaning of the Public Stores Act, 1875, and not included in the foregoing description, are not to be deemed regimental necessities under sect. 13 of that Act.

(j) *Disclosure of Official Secrets.*

By the Official Secrets Act, 1889 (52 & 53 Vict. c. 52, s. 1), where a person for the purpose of obtaining information, wrongfully enters a fortress or unlawfully obtains a sketch or plan of a fortress, etc., or, being in any possession of any such sketch or plan, wilfully and without lawful authority communicates the same to a person to whom it ought not to be communicated, he is guilty of a misdemeanour; and if he does so with the intention of communicating information to a foreign state, he is guilty of felony. By sect. 2, a person holding an office under the

Crown, who, contrary to his official duty, communicates such information, is guilty of a misdemeanour; and if the communication is made or attempted to be made to a foreign state, he is guilty of felony. By sect. 3, a person inciting another to commit any such offence is guilty of a misdemeanour.

(k) *Offences by and relating to Public Executive Officials.*

Wilful misconduct by officers charged with a public duty, whether by omission or act, is an offence at common law, and may be prosecuted by an indictment, or on an information in the discretion of the Court.

Extortion by public officers is punishable by various statutes.—King's officers generally by Stat. West. Prim. (3 Edw. 1. c. 26); by gaolers, etc., the Gaol Fees Abolition Act, 1850 (55 Geo. 3. c. 50, ss. 9, 13); sheriffs, the Sheriffs Act, 1887 (50 & 51 Vict. c. 50, s. 29 (2) (b)); coroners, the Coroners Act, 1887 (50 & 51 Vict. c. 76, s. 8 (2)).

So bribery of, or an attempt to bribe, a public official is a misdemeanour at common law.

The purchase or sale of public offices is punishable under the Sale of Offices Acts, 1551 and 1809 (5 & 6 Edw. 6. c. 16, and 49 Geo. 3. c. 126).

Bribery and corrupt practices in parliamentary elections are punishable under the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), a temporary Act, renewed from time to time under Expiring Laws Continuation Acts.

Bribery in municipal elections is a misdemeanour at common law, and is also punishable under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. 70). The same is applicable to county, district, and parish council elections, under the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 75), and the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 48).

The common law in regard to bribery of public officials is further enforced and defined by the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69). The

prosecution under the Act must be with the consent of the Attorney-General.

It is a misdemeanour, indictable at common law, to refuse to serve a public office: *R. v. Bower*, 1 B. & C. 585. In the case of refusal to serve the office of sheriff, where the year might be nearly expired before the indictment could be brought to trial, the Court has granted a criminal information: *R. v. Woodrow*, 2 T. R. 731.

(1) *Concealment of Treasure Trove.*

Concealment of treasure trove is a misdemeanour at common law, punishable by fine and imprisonment. It is within the jurisdiction of the coroner, at common law and by statute, to make an inquisition as to the treasure found, who were the finders, and who is suspected thereof: Coroners Act, 1887 (50 & 51 Vict. c. 71, s. 36).

(m) *Offences against the Public Revenue.*

These now chiefly consist in offences dealt with by the Consolidation Acts relating to smuggling and stamp duties, namely, the Customs Consolidation Act, 1876 (59 & 40 Vict. c. 36), and the Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38).

CHAPTER LIV.

3. OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP.

THESE may be classed as follows:—

- (a) *Blasphemy, including blasphemous libel.*
- (b) *Disturbing public worship.*

(a) *Blasphemy, including Blasphemous Libel.*

Blasphemy against God or the Christian religion is an offence indictable at common law.

There is much authority in the old cases for saying that a publication denying the existence of God, or denying in general terms the truth of the Christian religion, is blasphemous, whether the terms of such publication are decent

or otherwise. And the same principle might be said to extend to any publication directed against the formularies of the sacred Scriptures and formularies of the Church of England as by law established: see Stephen, "Digest of Criminal Law," p. 125.

But the view more consistent with modern opinion appears to be that discussion in a serious spirit, although calling in question or denying the essentials of religion or Christianity as set forth in the formularies of the Churches established or permitted by law, or the Scriptures recognised by them as sacred, is not a proper subject of criminal prosecution; while a publication, in an indecent and malicious spirit, assailing or aspersing the truth of Christianity or the Scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind, is properly to be regarded as a blasphemous libel. This view of the subject is stated by Lord Coleridge in *R. v. Bradlaugh* (1883), 15 Cox C. C. p. 217 (at p. 226), as follows: "The law has been laid down, in my judgment, with perfect accuracy, in the work of Mr. Starkie, 'The wilful intention to insult and mislead others by means of licentious and contumelious abuse offered to sacred subjects, or by wilful misrepresentation or wilful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious intention, or what is equivalent to such an intention in law as well as in morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong.'"

The following statutes upon the subject still remain upon the statute book:—

- 1 Edw. 6. c. 1 (an Act against such as shall irreverently speak against the sacrament of the altar and of the receiving thereof in both kinds), revived by 1 Eliz. c. 1, s. 14.
- 1 Eliz. c. 2, s. 4 (penalty for depraving the book of common prayer).
- 13 Eliz. c. 12, s. 2 (deprivation of ecclesiastical person maintaining doctrine against the Articles).

14 Chas. 2. c. 4, s. 20 (applies 1 Edw. 6. c. 1 to the present Book of Common Prayer).

9 & 10 Will. 3. c. 35 (c. 32 in Ruff.) (blasphemy against the Christian religion—repealed as to denial of any of the Persons in the Holy Trinity to be God, 53 Geo. 3. c. 160, s. 2).

60 Geo. 3. and 1 Geo. 4. c. 8 (seizure of blasphemous libel after verdict and punishment for second offence—repealed as to sentence of punishment, 11 Geo. 4. and 1 Will. 4. c. 73, s. 1, and S. L. R., No. 2, 1890).

These statutes do not in any way supersede a prosecution for blasphemy at common law. It may be added that a prosecution upon any of the statutes is now almost unknown ; and a prosecution at common law is hardly likely to be entertained except in a flagrant case tending to outrage public sentiment.

Blasphemy and offences against religion are not triable at quarter sessions : the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38, s. 1). No indictment for libel (presumably including blasphemous libel) can be preferred except under the conditions of the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17, s. 1, as extended by 30 & 31 Vict. c. 35, s. 1, and 44 & 45 Vict. c. 60, s. 6).

(b) *Disturbing Public Worship.*

By 1 M. st. 2, c. 3, it is made an offence, punishable on a proceeding before justices of the peace, to disturb a preacher in his sermon, or to molest a priest in celebrating mass, etc.

By 1 W. & M. c. 18 (Toleration Act, s. 15), penalties are imposed upon persons who disturb the worship of any cathedral or church or of any congregation, permitted by the Act.

By the Places of Religious Worship Act, 1812 (52 Geo. 3. c. 155), it is made penal to disturb any congregation of persons assembled for religious worship permitted or authorised by that Act or any former Act.

By the Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59, s. 4), all laws then in force against the wilfully and

maliciously or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship permitted or authorised by any former Act or Acts of Parliament, or disturbing, etc., any preacher or person officiating at such meeting, etc., shall apply to all meetings, assemblies, or congregations whatsoever of persons lawfully assembled for religious worship, and the preachers, etc., and persons there assembled.

By the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32, s. 2), persons guilty of riotous, violent, or indecent behaviour in any church or place of religious worship certified under the Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), or in a churchyard or burial-ground, are liable to punishment on summary conviction.

By the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), which permits burial in a churchyard without the rites of the Church of England, provisions are made (by sects. 7 and 8) against disorderly conduct, or wilful obstruction of the service.

CHAPTER LV.

4. OFFENCES AGAINST PUBLIC JUSTICE.

THESE may be classed as follows:—

- (a) *Escape, and other offences tending to evasion of lawful custody.*
- (b) *Perjury, and offences relating to evidence, or tending to the perversion of justice upon a trial.*
- (c) *Bribery of persons in a judicial capacity.*
- (d) *Compounding felony, and stifling prosecution for misdemeanour.*
- (e) *Libels reflecting on the administration of justice and contempt of Court.*

(a) *Escape, etc.*

“Escape” is technically committed by a person who, having a prisoner lawfully in his custody, voluntarily or

negligently suffers him to go at large : 1 Hale, 570. Such a person is guilty of a misdemeanour at common law. It is also a misdemeanour at common law, and further punishable under the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 29, for a person (whether innocent or guilty) to escape from lawful custody on a criminal charge, or for another to rescue such person.

The statutes, in aid of the common law upon this subject, are complicated; but there is a comprehensive enactment in the Prison Act, 1865 (28 & 29 Vict. c. 126, s. 37), that every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys, or causes to be conveyed into any prison any mask, etc., shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years.

The Act of 1865 was, by sect. 3, made not to apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison.

As to naval prisons, there is, in the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 82, an enactment similar to sect. 37 of the Prison Act, 1865. Escapes from military prisons are dealt with by the Army Act, 1881 (44 & 45 Vict. c. 58, ss. 20, 22). And as to the other exception, the prison commissioners, under the Prison Act, 1865, are now, by virtue of their office, directors of convict prisons: the Prison Act, 1898 (61 & 62 Vict. c. 41, s. 1). And see the Prison Act, 1884 (47 & 48 Vict. c. 51, s. 2 (2)).

Rescue, besides being an offence at common law, is, in certain cases, made punishable by statute. See the Murder Act, 1751 (25 Geo. 2. c. 37, s. 9); the Rescue Act, 1821 (1 & 2 Geo. 4. c. 88, s. 1); the Transportation Act, 1824 (5 Geo. 4. c. 84, s. 22); the Punishment of Offences Act, 1837 (7 Will. 4. and 1 Vict. c. 91, s. 1). At common law the offence is treason or felony if the prisoner rescued is in custody on conviction of such a crime; otherwise it is a misdemeanour.

Being at large, without lawful cause, during a sentence of penal servitude, is also an offence punishable by penal servitude, which may be for life : the Transportation Act, 1824 (5 Geo. 4. c. 84, s. 22); the Transportation Act, 1834 (4 & 5 Will. 4. c. 67); the Penal Servitude Act, 1857 (20 & 21 Vict. c. 3, s. 3); the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, s. 1).

Rescue of things legally distrained is also an indictable misdemeanour at common law. A summary remedy is also provided by the Pound-breach Act, 1843 (6 & 7 Vict. c. 30). But a more convenient remedy to the person aggrieved is to proceed under the Act 2 W. & M. c. 5, ss. 3, 4, for treble damages.

Rescue of a distress for rates is also indictable. But if the distress warrant is bad, the rescue is justifiable.

(b) *Perjury, etc.*

Perjury at common law is committed by a witness in a judicial proceeding, who, under oath competently administered to him in that proceeding, deliberately and wilfully makes a false statement material to the issue, knowing the statement to be false.

When the oath is administered otherwise than according to the common law, and only under the authority of a particular statute, the false oath, although a high misdemeanour, is not perjury unless so made by the statute requiring the oath.

Subornation of perjury by the common law is the procuring of a person to take a false oath amounting to perjury, who actually takes the oath and makes the false statement accordingly.

The most important general statutes imposing a punishment for perjury and subornation of perjury are the Perjury Act, 1728 (2 Geo. 2. c. 25, s. 2); the Hard Labour Act, 1822 (3 Geo. 4. c. 114); and the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100, ss. 19-21).

Other offences relating to the conduct of a trial are interference, by threats or otherwise, with witnesses, in the way of attempting to dissuade them from, or prevent them, giving evidence. These are, at common law, misdemeanours, and may also be punished as contempt of Court. Similarly, the attempt by bribes or corrupt means to influence the jury (described by the quaint name "embracery" at common law) is a misdemeanour punishable by fine or imprisonment.

As cognate offences, here may be classed what are termed "barratry, champerty, and maintenance." "Barratry" is a misdemeanour described as "habitually to move, excite, or maintain suits and quarrels" (8 Co. Rep. 36). "Champerty" is thus described in a statute of 33 Edw. 1. stat. 2 (A.D. 1304): "Champertors be they that move pleas and suits, or cause to be moved either by their own procurement, or by others, and sue them at their proper costs for to have any part of the land in variance, or part of the gains." "Maintenance" only differs from champerty in that the sharing of the gains is immaterial. The offence consists in the maintaining, at one's own charge or cost, the quarrel of another (a).

Under the same head, as tending indirectly, and prejudicially, to affect the solemnity of oaths as part of the machinery of justice, it has been made unlawful to administer an oath otherwise than in a judicial proceeding or in a matter in which the person administering the oath has jurisdiction or cognisance by some statute: Statutory Declarations Act, 1835 (5 & 6 Will. 4. c. 62, s. 13).

(c) *Bribery of Persons in a Judicial Capacity.*

Bribery of, or an attempt to bribe, persons acting in a judicial capacity, as well as other public officials (see p. 514, *supra*), is a misdemeanour at common law.

(a) It is difficult to find an example of a criminal prosecution for maintenance. The liability in a civil action was enforced in *Bradlaugh v. Newdigate* (1883), 11 Q. B. D. 1.

(d) *Compounding Felony, and stifling Prosecution for Misdemeanour.*

The offence of compounding felony is complete when an agreement is made not to prosecute, whether the agreement is carried out or not.

And, under sect. 101 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), it is felony to corruptly take any reward for helping to recover property stolen, unless all due diligence to bring the offender to trial has been used. For a similar object, a penalty is imposed (by sect. 102) on the person offering by advertisement a reward for the recovery of the property with an intimation that "no questions will be asked," etc.

It seems to be considered that an attempt to stifle a prosecution for a misdemeanour is criminal, though it is difficult to find a precedent for an indictment for such an offence, unless it may be brought under the head of conspiracy, or under a particular statute.

By 18 Eliz. c. 5, s. 4, compounding informations on penal statutes, without the sanction of the Court, is made criminal.

And by sect. 20 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), a person corruptly taking money to restore a dog which has been stolen (the offence of stealing a dog being not larceny or felony at common law, but a misdemeanour under the Act) is guilty of a misdemeanour.

(e) *Libels reflecting on the Administration of Justice and Contempt of Court.*

It is a misdemeanour punishable on information or indictment to publish, whether by word or writing, or by theatrical representations relating to pending legal proceedings, matter calculated to prejudice a fair trial.

Such a publication is also a contempt of Court, summarily punishable by committal by the Court itself.

Another kind of contempt of Court summarily punishable

by sentence by the Court itself, is where language insulting to the Court is used *ex facie* of the Court itself.

Where language insulting to a judge in his judicial capacity is used outside the Court itself, and not so as to cause prejudice to a pending trial, this is also a contempt, and in an exceptionally flagrant case may be punished by summary committal or fine by the Court; but, unless the case is one of such a nature, would ordinarily be left to an information: *R. v. Gray*, 1900, 2 Q. B. 36; cf. *McLeod v. St. Aubyn* (P.C.), 1899, A. C. 549, 561.

CHAPTER LVI.

5. OFFENCES AGAINST THE PUBLIC PEACE.

THESE may be classed as follows:—

- (a) *Unlawful assembly, rout, and riot.*
- (b) *Affray.*
- (c) *Forcible entry and detainer.*
- (d) *Challenge to fight.*
- (e) *Threatening letters.*
- (f) *Defamatory libel.*

(a) *Unlawful Assembly, etc.,*

An *unlawful assembly* is an assembly of three or more persons for an unlawful purpose.

It is also an unlawful assembly if three or more persons meet even for a lawful purpose where the manner of the meeting is such as to cause reasonable apprehension of a breach of the peace. But persons assembling for a lawful purpose, with no intention of carrying it out unlawfully, are not guilty of an unlawful assembly, merely because they know that their assembly will be opposed, and that a breach of the peace is likely to be committed by their opponents (a). The dividing line seems to be presented

(a) *Beatty v. Gillbanks* (1882), 9 Q. B. D. 308; 51 L. J. M. C. 117.

by the class of cases where persons meet to remove an illegal obstruction to the public right, such as a public right of way. In such a case it requires great care to show that nothing is done or intended to be done beyond what is strictly necessary for the exercise of the public right; and the old-fashioned method of vindicating the public right has probably become rarer owing to the modern facilities for obtaining an injunction.

A *rout* is where three or more meet to do an unlawful act upon a common quarrel, and make some advances towards it.

A *riot* is where three or more persons assembled together for the purpose actually do an unlawful act of violence.

By the Riot Act (1 Geo. 1. st. 2, c. 5), where twelve or more persons riotously, etc., assembled together to the disturbance of the public peace, riotously, etc., remain together by the space of an hour after proclamation in the King's name by justices of the peace or sheriff, etc., in the form directed by the Act, they are guilty of felony. By the Punishment of Offences Act, 1837 (7 Will. 4. and 1 Vict. c. 91), the punishment is transportation, commuted for penal servitude by the Penal Servitude Act, 1857 (20 & 21 Vict. c. 3). By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97, s. 11), riotously demolishing houses, etc., is a felony punishable with penal servitude for life. And by sect. 12, riotously injuring a building, etc., is a misdemeanour, punishable by penal servitude for a term not exceeding seven years.

(b) *Affray.*

An affray is a public offence to the terror of the King's subjects: 3 Co. Int. 158. So where two or more persons fight in a public place, it is an affray; while, if the fight is in private, it is no affray, but an assault.

Affrays may be suppressed by any private person present, who is justified in parting the combatants, whatever consequences may ensue. It is more especially the duty of a

constable or other officer of the peace to interfere, and carry the combatants before a justice, who may make them find sureties to keep the peace.

An affray is at common law a misdemeanour, punishable by fine or imprisonment, or both.

Analogous to the common law offence of affray is that prohibited by the Statute of Northampton (2 Edw. 3. c. 3), *i.e.* where a private person comes with force and arms before the King's justices or ministers doing their office, or brings force in affray of the peace, or goes or rides armed by night or day in fairs, markets, etc. Another analogous offence is that of tumultuous petitioning the King or Parliament, prohibited by 13 Car. 2. st. 1, c. 5.

Under the same head may be classed offences against the Night Poaching Acts, which, besides the protection of private rights in the game, are directed against acts which, by experience, have been found to lead to serious breaches of the peace, sometimes resulting in murder.

By the Night Poaching Act, 1828 (9 Geo. 4. c. 69), it is enacted (sect. 1) that "if any person shall by night unlawfully take or destroy any game or rabbits, in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game," he shall, upon conviction before two justices of the peace, be committed to prison for a term not exceeding three months with hard labour, and on the expiry of that period shall find sureties for not so offending again for the space of a year following, or in default shall be imprisoned with hard labour for a further term of six months. In case of a second or third conviction, enhanced punishments are enacted.

By sect. 9 of the same Act, if three or more persons by night, unlawfully enter any land for the purpose of taking game or rabbits, any of those persons being armed with an offensive weapon, each of the persons is guilty of a misdemeanour, and liable to penal servitude.

By sect. 12, for the purposes of the same Act, "night"

commences at the expiration of the first hour after sunset, and concludes at the beginning of the last hour before sunrise.

By the Night Poaching Act, 1844 (7 & 8 Vict. c. 29), the provisions of the former Act are extended to the like offences committed upon roads, highways, and paths.

(c) *Forcible Entry and Detainer.*

A forcible entry is when a man enters into lands or tenements *manu forti*. A forcible detainer is when a man who has entered unlawfully, though peacefully, maintains his unlawful possession by force.

Forcible entry is forbidden by the statute 5 Rich. 2. st. 1, c. 7 (c. 8 Ruff.), confirmed 15 Rich. 2. c. 2; extended to forcible detainer by 8 H. 6. c. 9. Further statutes, as to limitation of time and restitution, are 31 Eliz. c. 11; 21 Jac. 1. c. 8, s. 4, and 21 Jac. 1. c. 15.

(d) *Challenge to fight.*

A challenge to fight, either by word or letter, or to be the bearer of such a challenge, is, at common law, a misdemeanour, punishable by fine or imprisonment, or both.

(e) *Threatening Letters.*

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100, s. 16), it is enacted that "whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony." The punishment may extend to ten years penal servitude.

So by the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97, s. 50), it is felony to send, etc., knowing the contents thereof, a letter, etc., threatening to burn or destroy a house, etc.

So by the Larceny Act, 1861 (24 & 25 Vict. c. 96,

ss. 44, 46), it is felony to send, etc., knowing the contents thereof, a letter demanding money, etc., with menaces, or, with intent to extort money, to send, etc., a letter, threatening accusation of a crime.

And by the Libel Act (Lord Campbell's), 1843 (6 & 7 Vict. c. 96, s. 3), the threat to publish a libel, made with the intent to extort money from the person threatened, is an offence punishable by imprisonment, with or without hard labour.

(f) *Defamatory Libel.*

At one time it was frequently ruled, contrary to what has since been understood to be common law (*a*), that the question of libel or no libel was for the judge alone, and not for the jury. By the Libel Act, 1792 (Fox's Act) (32 Geo. 3. c. 60), it was declared that on every trial for publishing a libel, the jury should give their verdict on the whole matter in issue, and shall not be directed by the Court or judge to find the defendant guilty merely on the proof of the publication by such defendant of the paper charged to be a libel.

Where a publication is charged on a libel by *innuendo*, it is for the judge to decide whether the publication is capable of the meaning ascribed to it by the innuendo, and for the jury to decide whether such meaning is truly ascribed to it. In the former case the judge may direct a judgment for the defendant: *Sturt v. Blagg* (Ex. Ch. 1847), 10 Q. B. (Ad. & El.) 899; 16 L. J. Q. B. 39; cf. *Capital and Counties Bank v. Henty* (H. L. 1882), 7 App. Cas. 741; 52 L. J. Q. B. 232.

By the Libel Act, 1843 (6 & 7 Vict. c. 96, s. 4), any person maliciously publishing a defamatory libel, knowing the same to be false, is liable to imprisonment for a term not exceeding two years, and to pay such fine as the Court shall award. And, by sect. 5, the malicious publication of a defamatory libel makes the person who publishes (whether

(a) See *Parminster v. Coupland* (1840), 6 M. & W. 105, per PARKE, B.

knowing or without knowing the same to be false) liable to fine or imprisonment (not exceeding one year), or both.

By sect. 6 of the same Act, the defendant may plead justification by alleging the truth of the libel, and further that it was for the public benefit that the matters charged should be published; and the fact showing a reason why it was for the public benefit that the same should be published; and it was provided that the truth of the matter should in no case be inquired into without such plea of justification.

Truth is no defence where the statute does not apply. So it has been held that a magistrate in a preliminary investigation of a charge of libel, has no power to receive and perpetuate evidence of the truth of matters charged: *R. v. Townsend* (1866), 4 Fost. & Fin. 1089; *R. v. Carden* (1880), 5 Q. B. D. 1; 49 L. J. M. C. 1. By the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60, s. 4), the rule upon this point has been altered with respect to the hearing, before a Court of Summary Jurisdiction, of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein. The Court may receive evidence that the publication is for the public benefit, and that the matter is true, and the report fair and accurate and published without malice. In trivial cases relating to a newspaper libel, the case may (by sect. 5 of the last-mentioned Act), with the consent of the defendant, be dealt with summarily, and a fine up to £50 adjudged.

By the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64, s. 3), a fair and accurate report, in any newspaper, of any proceedings publicly heard before any Court exercising judicial authority, is privileged, if published contemporaneously with the proceedings, provided that the publication of any indecent or blasphemous matter is not authorised. And by sect. 4 of same Act, the privilege is extended to reports of public meetings, etc., unless it is proved that the publication was malicious.

CHAPTER LVII.

6. OFFENCES AGAINST PUBLIC TRADE.

THESE may be classed as follows :—

- (a) *Frauds upon creditors and other offences against the Bankruptcy laws.*
- (b) *Offences relating to Trade marks and false descriptions of goods.*
- (c) *Offences relating to sale or importation of food and drugs.*
- (d) *Offences by persons in the relation of Employer and workmen.*

(a) *Frauds upon Creditors, etc.*

By the statute 13 Eliz. c. 5, feigned gifts, bonds, and conveyances made to defraud creditors are (by sect. 2) declared void. And (by sect. 3) the parties to such conveyances using or maintaining the same as made upon good consideration, incur the penalty and forfeiture of one year's value of the lands, and the whole value of the goods and chattels, and the money contained in such feigned bond, and are liable to imprisonment for half a year.

So far as relates to the debtor making such gift, bond, or conveyance, the object of the statute of Elizabeth is covered and extended by the 13th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), which is as follows :—

“Any person shall, in each of the cases following, be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say,

“(1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud.

“(2) If he has, with intent to defraud his creditors or any of them, made or caused to be made any gift, delivery, or transfer of, or any charge on his property.

“(3) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.”

By sect. 11 of the same Debtors Act, 1869 (32 & 33 Vict. c. 62), as amended by sect. 163 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and by sect. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), any person adjudged bankrupt, or in respect of whose estate a receiving order has been made, is, in each of the cases specified in the Act, guilty of a misdemeanour, and liable, on conviction, to imprisonment for any time not exceeding two years, with or without hard labour.

The cases specified comprise sixteen categories, and cover almost every imaginable case of fraudulent concealment of property by the debtor or suppression of the facts relating to his estate.

Non-discovery by the debtor of estate to trustee, non-delivery of estate or of books and documents relating thereto, material omission in statement, and preventing the production of books, etc., are all criminal, unless the jury are satisfied that he had no intent to defraud.

So is failure by the debtor to inform the trustee of a false claim, when he knows or believes that a false debt has been proved on the estate.

Various fraudulent acts by the debtor done after the presentation of a bankruptcy petition, or within four months before such presentation, or, in case of a receiving order made under sect. 103 of the Bankruptcy Act, 1883, before the date of the order, are likewise made criminal.

By sect. 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), as amended by the above-mentioned section of the Acts of 1883 and 1890, a person adjudged bankrupt, or in respect of whose estate a receiving order has been made, if, after the presentation of a bankruptcy petition by or against him, or the commencement of the liquidation, or within four months before such presentation or commencement,

he quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of £20 or upwards, which ought to be divided amongst his creditors, he is, unless the jury is satisfied that he has no intent to defraud, guilty of felony, and liable to imprisonment for a term not exceeding two years, with or without hard labour.

By sect. 14 of the Debtors Act, 1869, a creditor in any bankruptcy who wilfully, and with intent to defraud, makes a false claim, or declaration, or statement of account which is materially untrue, he is guilty of a misdemeanour, punishable with imprisonment not exceeding one year, with or without hard labour.

By sect. 20 of the same Act, offences under the Act are brought within the jurisdiction of justices of the peace and recorders at sessions of the peace.

By the 31st section of the Bankruptcy Act, 1863 (46 & 47 Vict. c. 52), where an undischarged bankrupt, who has been adjudged bankrupt under the Act, obtains credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, he is guilty of a misdemeanour, and punishable as if he had been guilty of a misdemeanour under the Debtors Act, 1869.

(b) *Offences relating to Trade Marks, etc.*

The protection afforded by law to trade and merchandise marks has a twofold object: first, to protect the trader in the use of his genuine mark; and, secondly, to protect the public from deception by the false or fraudulent use of marks purporting to describe the goods as what they are not. The former object is enforced by the proceedings for injunction according to the practice established by the Court of Chancery and now exercised by the High Court, and by the County Courts in their equity jurisdiction. The latter object is primarily that of the Merchandise Marks Act. It should be observed that while the remedies under

the statute below mentioned are evidently intended, and are well devised to cover the whole ground of trade deceptions, the statutes do not interfere with the principle that sale of goods by a description which is knowingly false is indictable at common law, as cheating or obtaining goods by false pretences.

By the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), the offences under the Act are described (by sect. 2) as follows:—

“(1) Every person who—

“(a) forges any trade mark ; or

“(b) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive ; or

“(c) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark ; or

“(d) applies any false trade description to goods ; or

“(e) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark ; or

“(f) causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

“(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

“(a) that having taken all reasonable precautions against committing an offence against this Act, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description ; and

“(b) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

“(c) that otherwise he had acted innocently, be guilty of an offence against this Act.”

By sub-sect. (3) of the same section every person guilty of an offence against the Act is liable—

(i.) on conviction on indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii.) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding £20; and in the case of a second or subsequent conviction, to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding £50; and

(iii.) in any case to forfeit to the Crown everything by means of or in relation to which the offence has been committed.

By sub-sect. (4) the Court before whom any person is convicted may order the forfeited articles to be destroyed; by sub-sect. (5) a person aggrieved by a conviction by a Court of Summary Jurisdiction may appeal to Quarter Sessions; and by sub-sect. (6) the procedure under the Summary Jurisdiction Acts is applied to summary conviction, with the proviso that the person appearing is to be informed of his right to be tried on indictment, and to be tried accordingly if he requires it.

By sect. 3 of the Act—

“Trade mark” means a trade mark registered under the Patents, etc., Act, 1883 (46 & 47 Vict. c. 57), and includes a trade mark protected by the law of a foreign country and which the owner is entitled (and has applied) to have registered under Order in Council giving effect to an arrangement between the foreign government and the

government of this country, under sect. 103 of the Act of 1883.

“Trade description” means any description, statement, or other indication, direct or indirect—

- (a) as to the number, quantity, measure, gauge, or weight of any goods ; or
- (b) as to the place or country where the goods were made ; or
- (c) as to the mode of manufacturing or producing the goods ; or
- (d) as to the material of which the goods are composed ; or
- (e) as to the goods being the subject of an existing patent, privilege, or copyright.

The use of a figure or mark understood in the trade as an indication of any such matters is a trade description.

“False trade description” means a description which is false in a material respect as regards the goods to which it is applied ; and the provisions relating to a false trade description extend to any description or mark which is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the one whose manufacture or merchandise they really are.

Sects. 4 and 5 of the Act define the offence of “forging” and “applying” a trade mark, so as to cover various ways in which the object of the Act might be evaded. And in order to protect persons who may innocently be employed to assist in a contravention of the Act, a person charged with the offence of making any die, etc., for the purpose of forging a trade mark, or with applying to goods a false trade mark, may defend himself by proving—

- (a) that in the ordinary course of his business he is employed to make dies, etc., or to apply trade marks, and that in the case in which he is charged he was employed by some person resident in the United Kingdom, and that he is not interested in the sale of the goods ; and

- (b) that he took reasonable precautions against committing the offence charged ; and
- (c) that he had no reason to suspect the genuineness of the mark ; and
- (d) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the mark was applied.

This does not, however, prevent the innocent contravener from being liable to pay the costs of the prosecution, unless he has given due notice that he will rely on the above defence.

By sect. 19 the Act is not to exempt persons from civil proceedings, nor from making discovery in a civil action ; but the discovery so made shall not be admissible as evidence in the criminal prosecution.

By the Merchandise Marks Act, 1891 (54 & 55 Vict. c. 15, s. 1), the customs entry relating to imported goods is a trade description of the goods within the Merchandise Marks Act, 1887. And by sect. 2 the Board of Trade is empowered to make regulations for the prosecution by the Board of Trade of offences under the last-mentioned Act.

By the Merchandise Marks Prosecution Act, 1894 (57 & 58 Vict. c. 19), the powers exerciseable by the Board of Trade under the Act of 1891, may, in cases which appear to the Board of Agriculture to relate to agricultural or horticultural produce, be exercised by the Board of Agriculture.

(c) *Offences relating to Sale or Importation of Food and Drugs.*

To sell food or drink with knowledge that it is dangerous or unfit for human consumption is a misdemeanor at common law ; and if death ensues in consequence, the seller is indictable for manslaughter.

This principle is not in any way interfered with by the statutes, which enforce and extend the principle to various practices of trade which might evade the common law, and

provide an appropriate remedy by a Court of Summary Jurisdiction.

Statutes specially relating to the sale and importation of foods and drugs are the following :—

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63).

The Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51).

The following sections of the Public Health Acts relate to the subject of food :—

The Public Health Act, 1875 (38 & 39 Vict. c. 55, ss. 116-119).

The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 47).

By sect. 2 of the Sale of Food and Drugs Act, 1875, as extended by sect. 26 of the Sale of Food and Drugs Act, 1899, the word "food" includes every article used for food and drink by man, other than drugs or water, and any article which ordinarily enters into or is used in the composition or preparation of human food; and also includes flavouring matters and condiments. The term "drug" includes medicine for internal or external use.

Sect. 3 of the Sale of Food and Drugs Act, 1875, prohibits the mixing, colouring, etc., of any article of food with any ingredient so as to render the article injurious to health, with the intent that the same may be sold in that state, and no person shall sell any article so mixed, etc., under a penalty in each case of £50 for the first offence. A second offence is a misdemeanour punishable by imprisonment for a term not exceeding six months, with hard labour.

Sect. 4 prohibits, under a similar sanction, the mixing, etc., of any drug with any ingredient so as to affect injuriously the quality or potency of the drug, and the sale of a drug so mixed. This is subject to an exception in the case of compound drugs known to be in ordinary commercial use as so compounded. A person charged under either of these sections may defend himself (sect. 5) by showing that he did not know of the mixture, etc., and

that he could not with reasonable diligence have obtained that knowledge.

Sect. 6 prohibits, under a penalty of £20, the sale, to the prejudice of a purchaser, of any article of food or any drug which is not of the nature, substance, and quality of the article demanded by the purchaser; provided that an offence shall not be deemed to be committed under this section in the following cases:—

- (1) Where an ingredient not injurious to health has been added because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the weight, etc., of the article, or to conceal inferior quality.
- (2) Where the drug or food is a proprietary medicine, or is the subject of a patent, and is supplied in the state required by the specification of the patent.
- (3) Where the food or drug is compounded as in the Act is mentioned.
- (4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

Sect. 7 prohibits, under a penalty of £20, the sale of any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser.

By sect. 8, it is provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

Sect. 9 prohibits, under a penalty of £20, the abstraction, with the intent that the article may be sold in its altered state without notice, from an article of food any part

of it so as to affect injuriously its quality, substance, or nature, and likewise prohibits the sale of any article so altered without making disclosure of the alteration.

The Act contains (sects. 30-32) special provisions as to the inspection and analysis of tea on its arriving at a home port.

Under the Margarine Act, 1887 (50 & 51 Vict. c. 29), and the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), special provisions are made in regard to the importation and sale of margarine, margarine-cheese, and other articles of food, in order to protect purchasers against being taken in by the specious resemblance of such goods to butter, etc.

By the same Act (sect. 17), the penalty of £20 under the Sale of Food and Drugs Act, 1875, is liable to be increased on a second or subsequent conviction to £50 or £100; and where under either Act a person is liable to a penalty of more than £50, he may, if the Court is of opinion that the offence was committed by the personal act or culpable negligence of the person accused, and that a fine will not meet the circumstances of the case, be sentenced to imprisonment, with or without hard labour, for a period not exceeding three months.

By the Public Health Act, 1875 (33 & 39 Vict. c. 55, ss. 116-119), provisions are contained for the inspection by a medical officer of health or inspector of nuisances of meat, etc., exposed for the purpose of sale, and for seizure, in order to be dealt with by a justice of the peace, of any such meat as appears to be diseased or unfit for the food of man. The justice may condemn the article and order it to be destroyed or disposed of, so as to prevent its being exposed for sale as food; and the person on whose premises it was found exposed for sale is liable to penalties, and, alternatively, in the discretion of the justice, to imprisonment for a term not exceeding three months.

By the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 47), similar provisions are made in regard to unsound meat, etc., exposed for sale in London. The limit of penalty is higher, and imprisonment may extend to six months, with or without hard labour.

(d) *Offences by Persons in the Relation of Employer and Workmen.*

Formerly, the law upon this subject was regulated by the common law relating to conspiracy, and by numerous statutes which made criminal all kinds of combinations for the purpose of regulating rates of wages. Statutes of this kind, extending from 33 Edw. 1. to 57 Geo. 3., practically superseded any necessity of resorting to the common law of conspiracy.

But by statutes made in 1824 and 1825 (5 Geo. 4. c. 95, repealed and re-enacted, with certain alterations, by 6 Geo. 4. c. 129), all the former Acts relative to combinations to regulate wages, hours of work, etc., were repealed; and only acts involving violence, threats, intimidation, molestation, or obstruction, to induce persons to leave off work or to join an association to obtain an advance or reduction of wages, or to alter the hours of work, or to regulate the mode of carrying on a manufacture, trade, or business, were made criminal and punishable by imprisonment, with or without hard labour, for a time not exceeding three months. The latter of these Acts contained the proviso that persons should not be liable to punishment by meeting together for the sole purpose of consulting upon or determining the rate of wages, or the hours of work, or by entering into agreements amongst themselves accordingly.

But the statutes of Geo. 4. did not in any way deal with the common law of conspiracy; and, owing to the repeal of the former statutes, it became a burning question, both with text-writers and in the Courts, whether, or how far, the common law of conspiracy applied, so as to render criminal a combination to insist on an advance of wages or reduced hours of work, etc., by reason of its being "in restraint of trade," although it could not be alleged to be a conspiracy to commit a crime, inasmuch as the act, if done by a single person, would not be unlawful.

The question so raised led to the appointment, in 1867, of a Parliamentary Commission, and, in consequence of

their report, was passed the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32), which repealed the Act of 1825, and two other intermediate enactments, and made substantive enactments, some of which are, in effect, embodied in the Act of 1875, below mentioned.

On the same day (June 29, 1871) was passed the Trade Union Act, 1871 (34 & 35 Vict. c. 31), which, by sect. 2, enacts as follows:—

“The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.”

By sect. 17 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32) was repealed; and, by the same Act of 1875, it is enacted as follows:—

Sect. 3. “An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

“Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

“Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

“A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned, either absolutely or at the discretion of the Court, as an alternative for some other punishment.

“Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act

which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person."

By further sections of this Act the following acts are made criminal:—

Sect. 4. Wilfully and maliciously breaking a contract with a municipal authority or contractor who is under the duty of supplying a town, etc., with gas or water, where the probable consequences, in the knowledge of the delinquent, will be to deprive the inhabitants of their supply of gas or water.

Sect. 5. Wilfully and maliciously breaking a contract of service or hiring, knowing, or having reason to believe, that the probable consequences will be to endanger human life, or cause serious bodily injury, or to expose property to serious injury.

Sect. 6. A master who is legally liable to provide for his servant or apprentice necessary food, medical aid, or lodging, wilfully and without lawful excuse refusing or neglecting to supply the same, so that the health of the servant or apprentice is, or is likely to be, seriously or permanently injured.

Sect. 7. Wrongfully and without legal authority, with a view to compel any other person to abstain from doing, or to do, any act which he has a right to do or to abstain from doing—

- (1) using violence to or intimidating the other person, his wife or children, or injuring his property; or
- (2) persistently following him about from place to place;
or
- (3) hiding his tools, clothes, etc., or depriving him of the use thereof; or
- (4) watching or besetting his house or place of working;
or
- (5) following him with two or more other persons in a disorderly manner in or through any street or road.

It is explained that attending at or near the house or place of business, in order merely to obtain or communicate information, is not "watching" or "besetting" within the section.

By sect. 9 of this Act persons accused before a Court of Summary Jurisdiction may elect to be tried by indictment.

By sect. 16, the Act does not apply to seamen or apprentices in the sea-service; but the section does not exempt a person who is not a seaman from being charged with and being liable to punishment under the Act for an offence committed by him against a seaman.

The enactments contained in the Conspiracy and Protection of Property Act, 1875, are now extended and modified by the Trade Disputes Act, 1906 (6 Edw. 7. c. 47). The effect of some of the sections of this Act has already been stated in relation to civil obligations (pp. 53, 96, *infra*). But it seems convenient to set forth here the entire statute.

The Act received the Royal assent on the 21st of December, 1906. It is entitled—

AN ACT TO PROVIDE FOR THE REGULATION OF TRADES UNIONS AND TRADE DISPUTES.

It is enacted as follows :—

"1. The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875 :—

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

"2. (1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."

“(2) Section seven of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from ‘attending at or near’ to the end of the section.

“3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.

“4. (1) An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

“(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

“5. (1) This Act may be cited as the Trade Disputes Act, 1906, and the Trade Union Acts, 1871 and 1876, and this Act may be cited together as the Trade Union Acts, 1871 to 1906.

“(2) In this Act the expression ‘trade union’ has the same meaning as in the Trade Union Acts, 1871 and 1876, and shall include any combination as therein defined, notwithstanding that such combination may be the branch of a trade union.

“(3) In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression ‘trade dispute’ means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression ‘workmen’ means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises; and, in section three of the last-mentioned Act, the words ‘between employers and workmen’ shall be repealed.”

CHAPTER LVIII.

7. CONSPIRACY.

CONSPIRACY at common law is an indictable misdemeanour ; and has been defined as consisting in the *agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.*

This definition, stated in the above terms in Hawkins' "Pleas of the Crown," c. 72, s. 8, has been reiterated in judicial decisions, of which, perhaps, the most weighty is that of WILLES, J., reported in the appeal of *Mulcahy v. Reg.* (1868), L. R. 3 H. L. 306, at p. 317. "A conspiracy" (he says) "consists not merely in the intention of two or more, but in *the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.* So long" (the learned judge continues) "as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means."

It has been seen (p. 540, *ante*) that (by the Act of 1871) the purposes of a trade union are not unlawful, *by reason merely that they are in restraint of trade, so as to render any member of a trade union liable to criminal proceedings for conspiracy or otherwise.* And further, by the Act of 1875, *as to acts in furtherance of a trade dispute between employers and workmen*, the definition, *as a definition of criminal conspiracy*, can only apply, if for the word "unlawful" is read "criminal."

It has been held that neither of these statutory enactments applied to civil proceedings, or in any way interfered with the enforcement of a remedy by a civil action, which a person aggrieved by any act of the persons belonging to a trade union, or joining in any unlawful agreement, might have against the authors of the act. This is made clear

by the decision of the House of Lords in *Quinn v. Leathem* (1901), A. C. 495; 70 L. J. P. C. 76.

Quinn v. Leathem was a civil action, and the actual decision goes only to the civil remedy; but the opinions given by the learned Lords are strongly in favour of the proposition that, even as to criminal proceedings, the condition of the Act of 1871, "by reason *merely* that they (the purposes of the trade union) are *in restraint of trade*," did not apply to a *malicious intent*, on the part of the members of the union, *to injure an individual* in the lawful exercise of his trade; and further, that the expression in the Act of 1875, "act in contemplation or furtherance of a trade dispute between employers and workmen," was confined (as Lord LINDLEY expressly observes) to disputes between employers and their own workmen, and did not cover the case of an attempt, concerted between other persons, to interfere between an employer and his workmen with whom he has no dispute. To the same effect are the opinions expressed by the learned Lords in the case of *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905), A. C. 239. The question here, again, arose out of a civil action. The justification attempted was that the act of the union in ordering the men to break their contracts by stopping work was done *bonâ fide* in the interest of the employer and his workmen. It does not appear that there was at the time when the order of the union was given, any dispute between the employer and his own workmen; and it may be inferred from the tenor of the speeches of the learned Lords that the act, being malicious, in the sense that it was done with the knowledge that the result would be a legal injury, could not have been justified even on a criminal trial.

The law, as laid down by the two cases last mentioned, was altered by the Trade Disputes Act, 1906 (6 Edw. 7. c. 47, ss. 3, 4), already fully set forth at p. 543, *ante*.

It will be obvious, from what has been said, that a conspiracy to commit a crime is always a crime; and applying the judgment of WILLES, J., in *Mulcahy v. Reg.*,

supra, the agreement between two or more persons (to commit a crime) is itself a criminal act, whether the substantive crime is committed or not.

As a topic collateral with that of conspiracy, it may be here observed that the solicitation to commit a crime, although nothing be done in pursuance of such solicitation, is a misdemeanour at common law: *R. v. Higgins*, 2 East. 5; *R. v. Gregory* (1867), L. R. 1 C. C. R. 77.

And there are statutory crimes of the same kind; *e.g.* inciting to mutiny, made a felony by the Incitement to Mutiny Act, 1797 (37 Geo. 3. s. 70) (a); soliciting or endeavouring to procure commission of felony or misdemeanour against the post-office laws: Post Office Offences Act, 1837 (7 Will. 4. and 1 Vict. c. 36, s. 36); inciting to commit murder, made a felony by sect. 4 of Offences against the Person Act, 1861 (24 & 25 Vict. c. 100); inciting to commit an offence against the Official Secrets Act, 1889 (52 & 53 Vict. c. 52, s. 3).

So it is a misdemeanour at common law to attempt to commit a felony or misdemeanour. And certain attempts to commit crime are punishable by statute; *e.g.* to commit murder, by sects. 14 and 25 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100); attempts to commit an unnatural crime, by Offences against the Person Act, 1861 (24 & 25 Vict. c. 100, s. 62); attempts to defile a girl under the age of thirteen, or between thirteen and sixteen: Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69, ss. 4, 5). And under sect. 9 of the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), a person indicted for felony or misdemeanour may be convicted of an attempt to commit the offence charged, if the jury is satisfied that the offence was not completed.

(a) See p. 512, *ante*.

CHAPTER LIX.

8. OFFENCES AGAINST PUBLIC MORALS, ETC.

THESE may be classed as follows:—

- (a) *Bigamy*, and other high crimes against public morals.
- (b) *Nuisance*.
- (c) *Cruelty to animals*.
- (d) *Corrupt practices relating to public offices*.

(a) *Bigamy, etc.*

The crime of *bigamy*, while in one sense it is an offence against the person of the lawful husband or wife, or against the person who is induced by deception to enter into the relation constituted by a pretended marriage, is primarily an offence against public morals and society at large. The crime is defined by the Offences against the Person Act, 1881 (24 & 25 Vict. c. 100, s. 57), as follows:—

“Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and, being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years.”

There is a proviso that the section shall not apply if the former husband or wife has been continually absent from the person accused for seven years, and is not known by the accused to be living within that time, or if the former wife or husband, as the case may be, has been divorced *a vinculo* at the time of the second marriage.

Unnatural crimes, and indecent assaults upon male persons, which, in one sense, are offences against the person, and are so classed by the Offences against the Person Act, 1881 (24 & 25 Vict. c. 100), may here be mentioned as primarily offences against public morals. The sections of this Act which deal with them are the 61st and 62nd. And the principle of dealing with them as offences against

public morals, independently of the personal injury, is carried out by the Criminal Law Amendment Acts of 1880 and 1885 (43 & 44 Vict. c. 45, s. 2, and 48 & 49 Vict. c. 69, s. 11).

(b) *Nuisance.*

A common nuisance is a misdemeanour at common law, and is committed by every person who does an act not warranted by law, or omits to discharge a legal duty, so as to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all His Majesty's subjects: 1 Hawk. c. 75.

Where an act or omission, which is a nuisance at common law, and is also an offence by statute, the offender is generally liable to be prosecuted either under the statute or by an indictment at common law, but is not to be punished twice for the same offence: The Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 33).

Most public nuisances may be assigned to one or other of the following classes:—

- (i.) Relating to the public enjoyment or health.
- (ii.) Relating to the public safety.
- (iii.) Against public morals or decency.
- (iv.) Relating to the disposal of dead bodies.
- (v.) Interference with public rights of way, etc.

(i.) *Nuisances relating to the Public Enjoyment or Health.*

Besides acts or omissions indictable at common law under the general description already given, there are under the Public Health Act, 1875 (38 & 39 Vict. c. 55), a number of acts or omissions described as nuisances, and liable to be dealt with summarily under the Act. These are enumerated under sect. 91 of the Act. Most of them are conditioned by the description of being nuisances or dangerous or injurious to health. A furnace used for working engines in a manufactory is a nuisance liable to be dealt with under the Act, if it does not, so far as practicable, consume its own smoke.

These provisions are in addition to, and not to abridge or affect, any remedy at common law, with a similar proviso to the above under the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 33).

The provisions of the Public Health Act (sects. 116–119) relating to unsound food have been already stated (p. 538, *ante*).

(ii.) *Nuisances relating to the Public Safety.*

All acts, as well as negligent omissions, which obviously cause danger to the public, are indictable as nuisances at common law. As illustrations, the following acts and omissions have (amongst others) been authoritatively stated to be nuisances:—keeping a fierce and unruly bull in a field crossed by a public path; keeping explosives in dangerous proximity to streets or houses; allowing a house near a highway to be in a dangerously ruinous condition; negligently blasting stone in a quarry so as to be dangerous to persons in an adjoining highway or houses.

An excavation so near to a highway that a person passing along the highway is liable to fall into it, is a nuisance: *Barnes v. Ward* (1850), 9 C. B. 392; 19 L. J. C. P. 195; *Hadley v. Taylor* (1865), L. R. 1 C. P. 52. And the duty to fence in the case of a “quarry” (including every artificial opening made for getting stone, clay, etc.) is defined and extended by the Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19).

Primâ facie, where premises are in such a condition as to be a public nuisance, the occupier is liable. But where the premises are let with a covenant on the landlord’s part to repair, the tenant is relieved from responsibility in respect of a nuisance arising from want of repair. And probably, on a criminal charge, the occupier might relieve himself by showing absence of personal negligence, as, for instance, that the negligence was that of another person on whom he had relied for the duty being done: see *R. v. Clerk of Assize of Oxford Circuit* (1897), 1 Q. B. 370.

Other statutes defining and generally extending the offences which may, if creating an obvious danger, be indictable at common law, are the Explosives Act, 1875 (38 & 39 Vict. c. 17); the Petroleum Acts, 1871, 1879, and 1881 (34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47; and 44 & 45 Vict. c. 67); and the Post Office Protection Act, 1884 (47 & 48 Vict. c. 76, s. 1 (a)). These Acts provide summary remedies, but there is always the alternative, in a proper case, of an indictment at common law.

Again, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 457), it is a misdemeanour to send, or attempt to send, a British ship to sea in such an unseaworthy state as to endanger human life.

(iii.) *Offences against Public Morals or Decency.*

It is a misdemeanour at common law to expose the naked person in a public place and in the view of a number of other persons: *R. v. Crunden* (1809), 2 Camp. 89. And where the act is intentionally indecent, it is unnecessary to prove that it occurred in a public place: *R. v. Wellard* (1884), 14 Q. B. D. 63; 54 L. J. M. C. 14.

Public and indecent exposure of the person may be punished under the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100, s. 29), by imprisonment with hard labour; and where committed with the intent to insult any female, is punishable summarily under sect. 4 of the Vagrant Act, 1824 (5 Geo. 4. c. 83), and under sect. 28 of the Police Clauses Act, 1847 (10 & 11 Vict. c. 89), incorporated for urban districts in sect. 171 of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

The publication of an obscene book or picture is a misdemeanour at common law, punishable on indictment or information, and additional facilities are given for the suppression of the trade in such things by the Obscene Publications Act, 1857 (20 & 21 Vict. c. 83). An obscene exhibition in a public place, or to which the public are invited, for gain to the exhibitor, is likewise an indictable

offence; and where exposed to view in a shop window or other public place, is punishable under sect. 4 of the Vagrancy Act, 1824 (5 Geo. 4. c. 83), and sect. 2 of the Vagrancy Act, 1838 (1 & 2 Vict. c. 38).

By the Post Office Protection Act, 1884 (47 & 48 Vict. c. 76, s. 4), the sending by post any indecent print, etc., is an offence punishable on summary conviction.

By the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18), a summary punishment is enacted for affixing, etc., indecent pictures or advertisements (including advertisements relating to venereal diseases).

Keeping a brothel is a common law offence, indictable at common law. And by sect. 8 of the Disorderly Houses Act, 1751 (25 Geo. 2. c. 36), the person appearing to be or behaving as having the management of the house, is deemed to be the keeper thereof, although not the real owner or keeper. Other persons (as well as the keeper of the house) who are implicated in the use of premises as a brothel, are punishable on summary conviction under sect. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).

By the above-mentioned Act of 1751 (25 Geo. 2. c. 36), unlicensed places of entertainment in the cities of London and Westminster, or within twenty miles thereof, are to be deemed disorderly houses, and the persons keeping the same liable to forfeit the sum of £100 to such person as will sue for the same, and be otherwise punishable as the law directs in case of disorderly houses. The functions of the justices within this area are transferred by sect. 3 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), to County Councils. The Act is repealed so far as relates to the administrative county of Middlesex, and other, somewhat similar, enactments substituted, by the Music and Dancing Licenses (Middlesex) Act, 1894 (57 & 58 Vict. c. 15). The regulation of such places outside the twenty-mile area is prescribed by sect. 51 of the Public Health Amendment Act, 1890 (53 & 54 Vict. c. 59).

Under the same head of offences against public morals,

etc., may be included those created by a combination of common and statute law, relating to the keeping of a common gaming house, and unlawful gaming.

It has been laid down by judicial opinion (HAWKINS, J., in *Jenks v. Turpin* (1884), 13 Q. B. D. 505, at p. 515; 53 L. J. M. C. 161), that the keeping a common gaming house is in itself a nuisance, and the keepers of it guilty, at common law, of an indictable offence.

On the other hand, there is, at common law, no such offence as "unlawful gaming," but the phrase is used in statutes as creating an offence in connection with keeping a "common house" for the purpose. By none of these statutes is the phrase "unlawful gaming" expressly defined; but the kind of game which is stigmatised as "unlawful" is left to be inferred from the particular species of games which are expressly prohibited.

The first statute, still partially in force, upon the subject is 33 Hen. 8. c. 9, the primary object of which was to encourage the practice of archery, and as a subsidiary object prohibited the keeping of "any common house, alley, or place of bowling, coyting [and certain other games of skill], dicing table or carding, or any other manner of game prohibited by any statute heretofore made, or any unlawful new game now invented or made, or any other new unlawful game hereafter to be invented, found, had, or made, upon pain to forfeit, etc." And by sect. 12 a penalty was inflicted upon every person using or haunting any of the said houses, etc.

There are a number of subsequent statutes (for the most part repealed by the Gaming Act, 1845 (8 & 9 Vict. c. 109, s. 15)), which are quoted by HAWKINS, J., in the above-mentioned case of *Jenks v. Turpin*, as throwing light upon the meaning of "unlawful games" as employed in statutes upon this subject.

The games of skill mentioned as unlawful by the statute 33 Hen. 8. were no doubt so regarded with relation to the primary purpose of promoting archery; just as if a modern statute were to declare football unlawful in order to

promote rifle practice. They are by the Gaming Act, 1845, s. 1, declared to be no longer unlawful.

By sect. 2 of the Gaming Act, 1845 (8 & 9 Vict. c. 109), it is enacted that, in default of other evidence proving any house or place to be a common gaming house, it shall be sufficient, in support of any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein any unlawful game, and that a bank is kept there by one or more of the players exclusively of the other, or that the chances of any game played therein are not alike favourable to all the players. By sect. 4 of the same statute it is enacted that the owner or keeper of any common gaming house, and every person having the care or management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the business of any common gaming house, shall, on conviction, besides any penalty or punishment he may be liable to under 33 Hen. 8., be liable to forfeit a penalty not exceeding £100.

By the Gaming Act, 1854 (17 & 18 Vict. c. 38, s. 4), it is enacted that "any person being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit a penalty not exceeding £500, with the alternative of imprisonment.

The effect of the judgments by HAWKINS, J., and SMITH,

J., in the above case of *Jenks v. Turpin* (13 Q. B. D. 505), is as follows:—

(1) A “common” house, within the meaning of the common law and statutes relating to common gaming houses, is any house which is open to a considerable number of persons to enter and use for play.

(2) All games of chance are unlawful games, in the sense that the keeper of a common house for playing the same is liable to prosecution under the statutes; and probably the players are subject to penalties, and liable to be put upon their recognisances not to haunt such gaming houses (under sects. 12 and 14 of the Act 33 Hen. 8.).

(3) Excessive gambling would be strong evidence to show that the house is a common gaming house, so as to make the keeper of it indictable at common law.

(4) Where a game of chance is played, with a bank kept by one or more of the players, the keeper of the house and those assisting him in the business are liable to summary punishment under the Gaming Acts, 1845 and 1854.

The distinction implied in the above heads (2) and (3) between the liability at common law and under the statutes, perhaps requires explanation. In order to prove the offence at common law, it seems necessary to show that the business conducted is against public morals.

A distinction may be fairly drawn between a game with stakes calculated merely for the purpose of innocent recreation and a case where the house is used for gambling, so that the play is likely to be ruinous to some of the players. The line of distinction may be elastic, but there would be no difficulty for a judge, still less for a jury, to say in a particular case, having regard to the class of players and the stakes commonly played, on which side of the line the facts of the case placed it.

The Betting Act, 1853 (16 & 17 Vict. c. 119), is directed to a somewhat different, though analogous, object, namely, the suppression of betting houses.

This Act, by sect. 1, enacts that “no house, office, room, or other place shall be opened, kept, or used for the purpose

of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

By sect. 2, every such house, room, office, or place is to be deemed a common gaming house within the meaning of the Gaming Act, 1845.

By sect. 3, the owner or occupier who uses the room, etc., or permits the same to be used for such purposes, and any person having the care or management of or assisting in the business is liable on summary conviction to a penalty not exceeding £100, and on non-payment, or in the first instance, if the justices think fit, to imprisonment, with or without hard labour, for a time not exceeding six months.

By sect. 4, any person being the owner or occupier of any house, etc., used for such purposes as aforesaid, or any person having the care or management or assisting in conducting the business thereof, who receives, directly or indirectly, money, or any valuable thing, as a deposit on any bet, etc., shall be liable to a penalty not exceeding £50, and either on non-payment or in the first instance, if the justices see fit, to imprisonment, with or without hard labour, for a period not exceeding three months. This enactment

(by sect. 6) is not to extend to a person receiving or holding stakes to be paid to the winner of a race or lawful sport, or to the owner of a horse engaged in a race.

By sect. 7, there is a similar punishment imposed upon persons advertising a house, etc., kept for the purpose of making bets. This is extended by the Betting Act, 1874 (37 & 38 Vict. c. 15), to persons advertising offers to give tips or to act as betting agents.

It has been decided by the House of Lords that the owners of an inclosure adjoining a racecourse, who at race meetings admitted the public to the inclosure on payment of an entrance fee, were not liable as the owners of a "place" opened, kept, or used for the purposes prohibited by the Betting Act, 1853: *Powell v. Kempton Park Racecourse Company, Ltd.*, 1899, A. C. 143; 68 L. J. M. C. 392. But it has been decided by the Queen's Bench Division that a bookmaker who put up within an inclosure of the kind described in *Powell v. Kempton Park, etc.*, a flimsy erection, advertising his name and the odds offered, and stood there to make bets with backers, was properly convicted for using a "place for the purpose of betting with persons resorting thereto" within the meaning of the Act.

What have been called "coupon competitions" have been held to justify summonses for using the office for that purpose within the Betting Act, 1853: *Stoddart v. Hawke*, 1902, 1 K. B. 353; 71 L. J. K. B. 133; *Mackenzie v. Hawke*, 1902, 2 K. B. 216; 71 L. J. K. B. 565; *Lennox v. Stoddart* (C. A.), 1902, 2 K. B. 21; 71 L. J. K. B. 747.

The Street Betting Act, 1906 (6 Edw. 7. c. 43), makes it an offence, punishable on summary conviction, to loiter in streets or public places for bookmaking or betting. But this does not apply to ground used for a racecourse.

There are various Acts for the suppression of lotteries. The first is 10 & 11 Will. 3. c. 17, which declared all lotteries to be public nuisances. The latest of these statutes, the Lotteries Act, 1836 (6 & 7 Will. 4. c. 66), prohibits the advertisement of foreign lotteries.

By the Racecourse Licensing Act, 1879 (42 & 43 Vict. c. 18), a horse-race within ten miles of Charing Cross is a nuisance, unless held by license of the justices (now the County Council) of the county in which it is held.

By the Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), it is made a misdemeanour, punishable on indictment, or summarily, with imprisonment—

(by sect. 1) to send to an infant a circular, notice, letter, etc., inviting him to make a bet ; and

(by sect. 2) to send to an infant a circular, etc., inviting him to borrow money.

And (by sect. 4) soliciting an infant to make an affidavit, or statutory declaration for the purpose of a loan, is likewise punishable.

And by the Money Lenders Act, 1900 (63 & 64 Vict. c. 51, s. 5), the proof of knowledge of infancy by the person sending the circular or letter required by the Act of 1892, is satisfied, unless that person proves that he had reasonable ground for believing the infant to be of full age.

(iv.) *Nuisances relating to the Disposal of Dead Bodies.* —

It has been said that by the common law a duty is cast upon some one to provide Christian burial (which has been interpreted to mean a decent disposal) for a dead human body. In the case of a husband or father who has the means, the duty is clearly cast upon him. Otherwise the duty is *primâ facie* upon the householder in whose house the body is : *R. v. Stewart* (1841), 12 Ad. & El. 773.

Misdemeanours at common law relating to dead bodies may be classed as follows :—

To leave unburied the corpse of a wife or child, is a misdemeanour in the husband or father, if he has the means of providing decent burial (or other decent disposal) : *R. v. Vann* (1852), 2 Dan. 325 ; 21 L. J. M. C. 39.

To disinter a body without lawful authority is a misdemeanour : *R. v. Sharpe* (1856), 1 Dears. & B. 160.

To dispose of a body so as to prevent the coroner from

holding an inquest in a case where an inquest ought to be held, is a misdemeanour: *R. v. Price* (1884), 12 Q. B. D. 247; 53 L. J. M. C. 51.

But it is not a misdemeanour at common law to burn a dead body, instead of burying it, provided it is done in such a manner as not to cause annoyance to the public: *R. v. Price, supra*. Now, the securities for preventing a nuisance by the burning of a dead body are regulated by the Cremation Act, 1902 (2 Edw. 7. c. 8). And by sect. 8 of that Act, a contravention of the prescribed regulations renders the contravener liable to a penalty on summary conviction.

(v.) *Interference with Right of Public Way, etc.* —

It is an indictable nuisance at common law to obstruct a common highway.

So it is to obstruct the navigation of a public river.

So it is, for the persons upon whom the law imposes the duty of repairing a highway, to neglect the duty so that the highway becomes ruinous and unfit for traffic.

The duty as to a highway *primâ facie*, by the common law, lies upon the inhabitants of the parish; but the duty may be shown by usage to lie upon the owner of a certain tenement, *ratione tenuræ*.

Where the duty lies upon the inhabitants of the parish, there is the common law remedy of an indictment against the inhabitants. By the Highway Act, 1835 (5 & 6 Will. 4. c. 50), provision was made for the appointment in every highway parish of a "highway surveyor;" and by sect. 94 of that Act, if a highway was out of repair, a summary remedy was provided by complaint against the surveyor or other party liable; but where the duty of repair was denied, this might only lead up to the direction of the justices who heard the complaint that a bill of indictment should be preferred against the inhabitants of the parish.

The duty of repairing highways has been dealt with, and the subject made very complicated, by the various statutes

dealing with highways of various kinds. These are the Highway Acts, 1862 and 1864 (25 & 26 Vict. c. 61; 27 & 28 Vict. c. 101); the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 144); the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77, Part I.); the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 11); the Local Government (Transfer of Powers) Act, 1903 (3 Edw. 7. c. 15); the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 25). In the city of London the Commissioners of Sewers are the highway authority (11 & 12 Vict. c. clxiii.; 14 & 15 Vict. c. xci.); and in other parts of London and in the county of London the vestry, or district board, or the London County Council, as the case may be, are the highway authority (see 18 & 19 Vict. c. 120, s. 96; 51 & 52 Vict. c. 41, s. 41 (4)).

Recourse to indictment of a parish is now generally avoided in a case where the statutes provide a particular remedy. See in particular the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77, s. 10). But it does not appear that any of these statutes entirely supersede the common law remedy by indictment of the inhabitants; only it seems doubtful in point of form whether, under the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 6 (1) (a), s. 19 (4)), and the definition of "vestry" in sect. 75 (2), the indictment should not, in the case of a highway parish coextensive with a rural parish, be against the parish council, or parish meeting, as the case may be, instead of against the inhabitants. See note by Mr. Austin F. Jenkin, under "Highway," 12 R. C., p. 690.

As to the public bridges, that is, to public bridges over water flowing between banks in a defined channel, the liability, at common law, is *prima facie* upon the inhabitants of the county; and this liability was affirmed by the Statute of Bridges (22 Hen. 8. c. 5).

But bridges, like highways, may be repairable by individuals or corporations, *ratione tenuræ*.

And, by immemorial custom, a bridge may be repairable by an area other than a county; *e.g.* by a parish, or a hundred, or by a borough.

Now, by the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 79 (2)), the liability of the inhabitants of the county is transferred to the County Council, and it seems that the County Council, as successors to the liability of the inhabitants, are indictable if they allow a bridge (including the roadway for a distance of 100 yards from each end of the bridge) to fall into disrepair.

There are various ways, too complicated to discuss in the present work, in which the liability may be shifted under statutory authority. Again, there are special statutes relating to bridges in the Cinque Ports, Kent, Sussex, the Isle of Wight, South Wales, and Montgomeryshire, and there are numerous local Acts with reference to particular bridges.

(c) *Cruelty to Animals.*

By the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), and the Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60), previous Acts relating to cruelty to animals are consolidated and amended. These Acts do not create an offence punishable on indictment, but render various forms of cruelty to animals punishable by proceedings under the Summary Jurisdiction Acts.

The Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), extends the law to the cases where animals are subjected to painful experiments for scientific purposes, unless the experiment be made under the restrictions imposed by the Act. Where a penalty of more than £5 may be imposed for an offence against this Act, the accused may object to trial by a Court of Summary Jurisdiction, and the offence may be prosecuted by indictment. Prosecutions against a person licensed by a Secretary of State under the Act, may not be prosecuted except with the assent in writing of the Secretary of State.

By way of analogy to the Acts relating to cruelty to animals may be mentioned those relating to the protection of wild birds, namely, the Wild Birds Protection Acts, 1880 to 1904 (43 & 44 Vict. c. 35; 44 & 45 Vict. c. 51; 57 &

58 Vict. c. 24; 59 & 60 Vict. c. 56; 2 Edw. 7. c. 6; and 4 Edw. 7. c. 4).

In the same connection may be mentioned the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7. c. 15), which contains various salutary provisions for protecting a class of persons presumably incapable of protecting themselves.

(d) *Corrupt Practices.*

The offence of bribery in relation to elections has been already dealt with in Chapter LIV., at p. 514, *supra*.

The Prevention of Corruption Act, 1906 (6 Edw. 7. c. 34), deals with corrupt practices relating to agency.

By this Act (sect. 1) it is made a misdemeanour for an agent corruptly to accept, or for any person corruptly to give or to offer him, any gift or consideration as an inducement or reward for doing or forbearing to do any act in relation to the principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to such affairs or business; and also for any person to give to the agent or for the agent knowingly to use, with intent to deceive the principal, any receipt, account, or other document, containing a false statement, and with knowledge on the part of the person charged, of an intention to mislead the principal.

CHAPTER LX.

FOLLOWING the natural division indicated on p. 505, there are to be considered, secondly—

II. OFFENCES PRIMARILY CONCERNING INDIVIDUALS.

The law relating to most of these has been, at a comparatively recent period, codified under the series of statutes passed in the year 1861 (24 & 25 Vict. c. 96, c. 97, c. 98, and c. 100), now cited under the titles of "The Larceny Act, 1861," "The Malicious Damage Act, 1861," "The

Forgery Act, 1861," and "The Offences against the Person Act, 1861" (a).

These Acts, with the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), which has been already briefly referred to under the head of Offences of a Public Nature (2 (d), at p. 510, *supra*), and the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), which relates to indictable offences generally, constitute a criminal code, which, so far as relates to the offences dealt with, supersedes an undigested mass of criminal law depending on the common law and various statutes repealed by another Act of 1861 (24 & 25 Vict. c. 95).

The offences primarily concerning individuals may now be dealt with under the two following heads and subdivisions:—

A. OFFENCES AGAINST THE PERSON.

These may be classed as follows:—

1. *Murder, and other crimes resulting in, or having a tendency towards destruction of human life, or serious bodily injury.*
2. *Assault.*
3. *False imprisonment.*
4. *Abduction, and procuration of women and girls.*
5. *Rape, etc.*

B. OFFENCES AGAINST PROPERTY.

1. *Larceny, etc.*
2. *Forgery.*
3. *Malicious damage to property.*

A. OFFENCES AGAINST THE PERSON.

1. *Murder, etc.*

The statutory law relating to offences under this head, is now comprised in the Offences against the Person Act,

(a) See the Short Titles Act, 1896 (59 & 60 Vict. c. 14).

1861 (24 & 25 Vict. c. 100). For the meaning of the words employed in that Act, it may be necessary to refer to judicial decisions either before or after the statute.

By the first section of this Act, it is enacted as follows: "Whosoever shall be convicted of murder shall suffer death as a felon."

And by sect. 6, it is sufficient in an indictment for murder to charge that the defendant did "feloniously, wilfully, and of his malice aforethought kill and murder the deceased." This appears to comprise the assertion of the following elements: (1st) that the deceased died in consequence (as a proximate cause) of the act of the defendant; (2nd) that the act was such as was likely, in the ordinary course of nature, to cause death; (3rd) that the Act was intentional—that is to say, it was the act of an intelligent agent, capable of understanding the probable consequence; and (4th) that the intent was malicious, in the sense that it was either deliberately wicked, or reckless (that is to say, wantonly indifferent as to the natural consequence).

The following states of mind are mentioned by Sir J. Stephen ("General View of Criminal Law," ch. 4) as having been specifically determined to be wicked or malicious in the degree necessary to constitute murder:—

"(a) An intent to kill, whether directed against the person killed or not, or against any specific person or not.

"(b) An intent to commit felony.

"(c) An intent illegally to do great bodily harm.

"(d) Wanton indifference to life in the performance of an act likely to cause death, whether lawful or not.

"(e) A deliberate intent to fight with deadly weapons.

"(f) An intent to resist a lawful apprehension by any person legally authorised to apprehend."

For example, A. and B. deliberately fight with small-swords or pistols. A. kills B. A. is guilty of murder.

On the other hand, A. and B. fight with their fists. A., finding his advantage, and intending a blow to put B. out of time, strikes a blow which, owing to some constitutional weakness in B., proves fatal. That is only manslaughter.

Both men have been guilty of an illegal breach of the peace. But there was no such probability of the blow being fatal as to make the act amount to murder.

In the consolidating statute there is no attempt to define manslaughter, any more than to define murder. By the 5th section, a person convicted of manslaughter is liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, or (either in addition to or without such punishment as above) to pay such fine as the Court shall award.

The wide discretion here given to the Courts is, of course, intended to meet very diverse degrees of criminality.

By sect. 6 (already cited in regard to murder) of the same Act, it is sufficient in an indictment for manslaughter to charge that the defendant, "did feloniously kill and slay the deceased."

The states of mind necessary to the crime of manslaughter are thus classified by Sir James Stephen:—

"(a) An intent to kill under the recent provocation, either of considerable personal violence inflicted on the prisoner by the deceased, or of the sight of the act of adultery committed by the deceased with the prisoner's wife.

"(b) An intent to inflict bodily injury not likely to cause death under a slight provocation, as where a man striking a trespasser with a slight stick kills him.

"(c) A deliberate intent to fight in a manner not likely to cause death, or an intent to use a deadly weapon in a fight begun without the intention to use it.

"(d) An intent to resist an unlawful apprehension, or an apprehension of the lawfulness of which the prisoner had no notice.

"(e) An intent to apprehend, or otherwise to execute legal process executed with unnecessary violence.

"(f) Negligence in doing a lawful act or an unlawful act not amounting to felony."

Again, there are cases where the act, resulting in death,

even though the intention is to cause death, is no crime. And, by sect. 7 of the same Act, "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony." The state of mind under which such acts have been held to be done innocently are classified by Sir J. Stephen as follows:—

(a) An intent to execute sentence of death (*a*).

(b) An intent to defend person, habitation, or property against one who manifestly intends or endeavours by violence or surprise to commit a known (*i.e.* apparent) felony, such as rape, robbery, arson, burglary, etc.

(c) An intent lawfully to apprehend or keep in custody a felon who cannot otherwise be apprehended or kept in custody, or to keep the peace if it cannot otherwise be kept (*b*).

(d) Absence of all unlawful or malicious intents or states of mind. (This is the case of accident.)

It is a rule of evidence that where one person is shown to have killed another, malice in the sense which infers murder is presumed until the accused succeeds in proving a circumstance extenuating the crime or disproving the criminal intent (Sir J. Stephen, p. 117).

By sect. 4 of the Act above referred to, conspiracy to murder is made a substantive crime. And attempts to murder are dealt with by sects. 11–15.

By sect. 16 it is made a felony to send a letter threatening to kill any person.

Acts causing or tending to cause danger to life, or grievous bodily harm to any person, or administering drugs to facilitate the commission of crime, are punishable under sects. 17–35 of the Act.

(a) That is, presumably, by a person authorised to execute the sentence. See sect. 2 of the Central Criminal Court (Prisons) Act, 1881 (44 & 45 Vict. c. 64), and sect. 13 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55).

(b) Perhaps this might be safely extended to every case of the execution by an officer of the law charged with the duty to apprehend or keep in custody a person, whether guilty of felony or otherwise (1 Hale 494, 2 Hale 118). See as to Gaolers, The Prison Act, 1898 (61 & 62 Vict. c. 41, s. 10).

Such are (sect. 17) impeding a person in his endeavour to save himself from shipwreck ; (sects. 18, 19) shooting with intent to do grievous bodily harm, a felony ; (sect. 20) malicious wounding, a misdemeanour ; (sect. 21) garotting, a felony ; (sect. 22) using stupefying drug with intent to commit indictable offence, a felony ; (sects. 23-25) administering dangerous or noxious drug, felony or misdemeanour, as the case may be ; (sect. 26) not providing apprentices or servants with food, so that life is endangered ; (sect. 27) exposing a child, so that life is endangered ; (sects. 28-30) causing injury by explosion, or dealing with explosives with intent to do bodily harm ; (sect. 31) setting man-traps or spring-guns, calculated to inflict grievous bodily harm, a misdemeanour ; (sects. 32-34) wilful acts endangering passengers on a railway ; (sect. 35) wanton or wilful injury by furious driving.

By the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7. c. 15, s. 1), a person over the age of sixteen years, who has the custody, charge, or care of any child under the age of sixteen years, and who wilfully assaults, ill-treats, neglects, abandons, or exposes such child in a manner likely to cause such child unnecessary suffering or injury to health, is guilty of a misdemeanour, and liable, on indictment, to a fine not exceeding £100, and, alternatively, or in default of payment, or in addition thereto, to imprisonment, with or without hard labour, for a term not exceeding two years ; and, on summary conviction, to a fine not exceeding £20, or in default, or in addition thereto, to imprisonment, with or without hard labour, for a term not exceeding six months. The punishment is liable to be increased to a fine of £200, or penal servitude, in lieu of imprisonment, if the person indicted of the offence is proved to have had a pecuniary interest in the death of the child. By the same section 1 (3), upon the trial of a person over the age of sixteen for manslaughter of a child under the age of sixteen, the jury may find the accused guilty of an offence under this section. Other statutory provisions for the protection of young children will be found in the

Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34, s. 3), extended by the Children's Dangerous Performances Act, 1897 (60 & 61 Vict. c. 52, s. 1). And for protection of lunatics there are the provisions of the Criminal Lunatic Asylums Act, 1861 (23 & 24 Vict. c. 75, s. 13), and the Lunacy Act, 1890 (53 & 54 Vict. c. 5, s. 322).

Closely analogous to the offences relating to violent destruction of human life are those relating to concealment of birth and endeavours to procure abortion.

By sect. 60 of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), "If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof," is guilty of a misdemeanour, and liable, upon conviction, to imprisonment, with or without hard labour, for a term not exceeding two years. It is further enacted that on a trial for murder of the child the jury may, in acquitting of murder, convict the prisoner of the endeavour to conceal the birth, and the Court may pass sentence accordingly.

By sect. 58 of the same statute, the administering of a poison or use of an instrument to procure abortion is a felony, punishable by penal servitude or imprisonment, with or without hard labour. And, by sect. 59, the unlawful supply or procuring of a poison or instrument, knowing that the same is to be used for the last-mentioned purpose, is guilty of a misdemeanour, and liable to penal servitude for three years, or imprisonment for a term not exceeding two years, with or without hard labour.

By sect. 64 of the same Act, the manufacture or possession of explosives, with intent to commit or to enable any other person to commit an offence against the person which is a felony under the Act, is a misdemeanour. And, by sect. 65 (extended by sect. 86 of the Explosives Act, 1875, 38 & 39 Vict. c. 17), justices of the peace may issue a search warrant on suspicion of explosives being manufactured or kept contrary to the provisions of these Acts.

By sect. 67, accessories before the fact to any felony, punishable under the Act, are punishable as principals; accessories after the fact, in the case of murder, are liable to penal servitude, which may extend to life; and accessories after the fact to any other felony, punishable under the Act, and liable to imprisonment, with or without hard labour, for a term which may extend to two years.

CHAPTER LXI.

2. ASSAULT.

By sect. 36 of the Offences against the Person Act, 1861, to obstruct, or endeavour to obstruct, a clergyman or other minister in celebrating Divine service in a church, chapel, or other place of Divine worship, or in the lawful burial of the dead, or upon any civil process, or, under the pretence of executing civil process, to arrest any clergyman or other minister in his service, or in going to or returning from service, is a misdemeanour, punishable by imprisonment not exceeding two years, with or without hard labour.

By sect. 37, to assault a magistrate or other person lawfully engaged in the exercise of his duty, in the preservation of a vessel in distress, or of a wreck or wreckage, is a misdemeanour, punishable by penal servitude not exceeding seven years, and not less than three years, or by imprisonment for a term not exceeding two years, with or without hard labour.

By sect. 38, assault with intent to commit felony, or assault of a peace officer in the due execution of his duty, or assault with intent to resist lawful apprehension of a person for any offence, is a misdemeanour, punishable by imprisonment, not exceeding two years, with or without hard labour.

By sect. 39, assault with intent to obstruct the sale of grain, flour, etc., or its free passage to or from market, renders the offender liable, on conviction before two justices

of the peace, to imprisonment for a term not exceeding three months.

By sect. 40, assaults on seamen, etc., with intent to hinder them in the exercise of their lawful occupation, are punishable, on conviction before two justices of the peace, by imprisonment with hard labour for a term not exceeding three months.

By sect. 42, where a common assault is committed, the case may, on complaint of the party aggrieved, be heard before two justices, and the offender, upon conviction, imprisoned, with or without hard labour, for a term not exceeding two months, or be condemned in a fine not exceeding, with costs, the sum of £5, with imprisonment in default of payment.

By sect. 43, assaults of an aggravated nature upon a boy under fourteen, or upon any female, render the offender liable, upon conviction before two justices, to imprisonment, with or without hard labour, for a period not exceeding six months, or a fine, including costs, not exceeding £20, with imprisonment in default of payment.

By sect. 44, if the justices find, on complaint under either of the two preceding sections, that the offence is not proved, or is too trifling to merit punishment, they are to give the accused a certificate accordingly, which (by sect. 45) effects a release from all further proceedings, civil or criminal, for the same cause.

By sect. 46, provision is made that if the justices find the assault complained of to have been accompanied by an attempt to commit felony, or otherwise to be a fit subject for an indictment, they shall deal with the case in all respects in the same manner as if they had not authority finally to deal with the case; and also that the justices shall not be authorised to hear and determine a case of assault in which any question arises as to the title to land, or as to any bankruptcy or insolvency, or any execution under the process of a court of justice.

By sect. 47, conviction upon an indictment of any assault occasioning actual bodily harm, renders the offender liable

to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Apart from the statutory enactments relating to assault, there may be an indictment for assault at common law, the indictment, after describing the assault, concluding "against the peace of our lord the King, his crown and dignity," instead of "against the form of the statute," etc.

CHAPTER LXII.

3. FALSE IMPRISONMENT.

THIS includes the assault by which the offender caused the person aggrieved to be illegally arrested against his will, and the subsequent illegal detention. False imprisonment is a misdemeanour indictable at common law.

A form of false imprisonment, commonly known as "kidnapping," consists in the stealing or carrying away any person from his own country to another.

By the Kidnapping Act, 1872 (35 & 36 Vict. c. 19), kidnapping by a British subject of natives of islands in the Pacific Ocean is made a felony indictable in any of the Supreme Courts of Justice in any of the Australian colonies.

If the prosecutor proves the imprisonment, it is for the defendant to show that the imprisonment was lawful.

Arrest under civil process, properly so called, is now abolished; and imprisonment for a cause arising out of a civil debt is only justifiable under a judgment or order of committal under the provisions of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and the Absconding Debtors Act, 1870 (33 & 34 Vict. c. 76); or an order of committal by a Court having jurisdiction in bankruptcy under the 165th section of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

Where a person is committed to prison upon conviction of a crime, there is a practical difference between the sentence of a judge of the High Court and that of inferior

judges. In the former case the judge is competent to determine what is the limit of his jurisdiction, and cannot be said to exceed it, unless he acted without colour of right: *Taafe v. Downes* (1813), 3 Moore P. C. 36 n.; 3 St. Tr. (N.S.) 1317. If a magistrate or inferior judge act entirely outside the scope of his jurisdiction, his order will not justify the officer in executing it; but a conviction by a magistrate having competent jurisdiction over the subject-matter is, until reversed or quashed, conclusive evidence, even in favour of the magistrate, in a prosecution against him for false imprisonment. See the Justices Protection Act, 1848 (11 & 12 Vict. c. 44, s. 2).

Arrest under criminal process may be justified by the warrant of a magistrate having cognizance of the matter, executed within the proper jurisdiction. In the ordinary case of indictable offences this is within the county or burgh for which the justice granting it acted (11 & 12 Vict. c. 42, s. 10), or, in case of fresh pursuit within seven miles of the border of such county, etc. Warrants issued in one county, etc., may be executed in another county, etc., if backed by a justice having jurisdiction in the latter county, etc. (11 & 12 Vict. c. 42, s. 11). By the same Act, sects. 12–15, English warrants may be backed in Ireland, the Channel Islands, or Scotland, and *vice versâ*. And a warrant issued by a justice for a borough may, under sect. 223 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), be executed in any county wherein the borough or any part thereof is situate, or within any distance, not exceeding seven miles, from the borough.

Arrest without warrant may be justified (1) by any person, and *à fortiori* by a peace officer, if a felony is committed, or a dangerous wound inflicted, in his presence; (2) by any person, of the persons engaged in an affray while it is continuing, or if there is reasonable ground to suspect that it is immediately to be renewed; (3) by any person, where a felony has been actually committed, and he has reasonable ground for believing that the person whom he has given into custody has committed that felony. And

any person may arrest another who is about to commit a felony, or any act which would endanger life, and detain him until the intent has presumably ceased; (4) by a constable within his bailiwick, of a person whom he has reasonable ground for charging with felony, although it should afterwards appear that no felony has been committed.

Justification of arrest is, in certain cases, provided for by statute.

By sect. 103 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), any person may arrest without warrant a person found committing any offence against the Act (except angling in the daytime), and forthwith take him, with the property, if any, before some neighbouring justice, to be dealt with according to law. By sect. 31 of the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), any person may apprehend a person committing an indictable offence against the Act, and give him in charge to a peace officer to be brought before a justice of the peace, to be dealt with according to law. And by sect. 190 of the Customs Act, 1876 (39 & 40 Vict. c. 36), any person may apprehend a person making signals, contrary to the Act, for the purpose of giving notice to those on board a smuggling ship. And by the Prevention of Offences Act, 1851 (14 & 15 Vict. c. 19, s. 11), any person whatsoever may apprehend any person found committing any indictable offence in the night (*i.e.* between 9 p.m. and 6 a.m.), and to deliver him to a peace officer to be conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

By sect. 61 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), a peace officer, or the owner of property injured, or his servant, or any person authorised by him, may arrest any person found committing an offence against the Act, and forthwith take him before a neighbouring justice of the peace, to be dealt with according to law. By sect. 2 of the Night Poaching Act, 1828 (9 Geo. 4. c. 69), the owner or occupier of land, or person having a right or reputed right of free warren, or the lord of the manor or reputed

manor in or over the land, and their respective gamekeepers or servants, may arrest a person found on the land committing any of the offences mentioned in sect. 1 of the Act, and deliver him into the custody of a peace officer, in order to his being conveyed before two justices of the peace. And, by sect. 104 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and sect. 66 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony in the respective Acts mentioned, and take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.

Where a prisoner in lawful custody escapes, by the negligence of the gaoler or officer in charge, the gaoler or officer may retake him without a fresh warrant. Prison officers have, by the Prison Act, 1898 (61 & 62 Vict. c. 41, s. 10), all the powers and privileges of constables.

By the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42, s. 20), the justice or justices before whom a witness is examined may bind by recognizances the witness to appear at the Court at which the accused is to be tried; and, if he refuse to enter into the recognizance, may commit him to prison until after the trial, unless in the mean time he enters into the recognizance required.

Courts having bankruptcy jurisdiction have power to commit the bankrupt for trial for a misdemeanour, and the incidental powers, including arrest, for that purpose: the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 165).

In the statutes relating to the Navy and Army, powers of arrest, etc., are conferred upon officers in a variety of cases. In the case of volunteer corps these powers cease with the period of active service or training. And if an arrest be made for an offence committed during the period of training, there is nothing to justify a detention for a subsequent

period longer than is necessary for the change to be immediately dealt with. See *Army Act, 1881* (44 & 45 Vict. c. 58, ss. 45, 175, 176); *Marks v. Frogley* (1898), 1 Q. B. 396.

By the common law, a Court of Record has jurisdiction to order imprisonment for contempt committed in the face of the Court, and the order made orally by the judge justifies the officers of the Court in instantly apprehending and imprisoning the offender without any further evidence.

CHAPTER LXIII.

4. ABDUCTION, ETC.

THE abduction of a woman against her will, from motives of lucre, or the fraudulent abduction of a girl under the age of twenty-one against the will of her father or other person having the lawful care of her, with intent to marry or carnally know her, is a felony punishable under sect. 53 of the *Offences against the Person Act, 1861* (24 & 25 Vict. c. 100). And the property of any such female is protected, and may be the subject of a settlement under the same section. By sect. 54 the forcible abduction of a woman is made a felony, without reference to any motive as to property; and, by sect. 55, the abduction of a girl under sixteen, against the will of the father or other person having the lawful care of her, is likewise made a misdemeanour.

By the *Criminal Law Amendment Act, 1885* (48 & 49 Vict. c. 69, s. 7), the abduction of a girl under the age of eighteen out of the possession or against the will of her father or mother or other person having the lawful charge of her, with the intent that she should be carnally known, is a misdemeanour, punishable by imprisonment for a term not exceeding two years, with or without hard labour.

By the same Act, sects. 2 and 3, the procuration or attempt to procure for immoral purposes a woman or girl, not being

a common prostitute, or of known immoral character, is a misdemeanour, punishable by imprisonment for a term not exceeding two years, with or without hard labour.

Child-stealing, or taking or enticing away from parent or guardian, by force or fraud, of a child under fourteen, is a felony punishable under sect. 56 of the Act 24 & 25 Vict. c. 100.

CHAPTER LXIV.

5. RAPE, ETC.

RAPE, or the carnal knowledge (effected by penetration) of a woman by force and against her will, is a felony, both at common law and by sect. 48 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), and render the offender liable to penal servitude for life.

Indecent assault on a female is punishable under sect. 52 of the same Act.

Carnal knowledge of a girl under thirteen is a felony under sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), involving liability to penal servitude for life. And the attempt is a misdemeanour under the same section. By sect. 5 of the same Act, likewise, carnal knowledge of a girl between thirteen and sixteen, or of an imbecile, is a misdemeanour, involving liability to imprisonment for a term not exceeding two years, with or without hard labour. By sect. 6 of the same Act, the owner or occupier of premises knowingly permitting them to be used for this purpose, is, in case of girls under thirteen, guilty of felony; and, in case of girls between thirteen and sixteen, guilty of a misdemeanour. By sect. 9 of the same Act, if on the trial of an indictment for rape, or of an offence made felony by sect. 4 of the Act, the jury are satisfied that the defendant is guilty of carnal knowledge, or of an indecent assault, but not of the offence charged, or of an attempt to commit the same, they may so find, and the defendant may be sentenced to punishment accordingly.

CHAPTER LXV.

B. OFFENCES AGAINST PROPERTY.

FOLLOWING the order indicated on p. 562, *supra*, these include—

1. *Larceny*, and other crimes dealt with by the Larceny Acts, 1861 to 1901.

The criminal law relating to larceny and offences of the like nature is (speaking generally) comprised in the Larceny Act, 1861 (24 & 25 Vict. c. 96); the Larceny Act, 1868 (31 & 32 Vict. c. 116); the Larceny Act, 1896 (59 & 60 Vict. c. 52); and the Larceny Act, 1901 (1 Edw. 7. c. 10).

Larceny, or theft, according to Bracton's definition, borrowed from the Roman law, is "the fraudulent taking (*contrectatio*) of the property of another, with intent to steal, against the will of the owner of the property."

The definition of larceny or theft at common law has been narrowed by various steps. First, it was held that a charge of theft could not be sustained by the allegation that the accused "feloniously cut down and carried away trees," because the trees were affixed to the freehold, and theft must be of "moveables corporeal." As to animals, horses, cattle, sheep, etc., were subjects for larceny. Wild animals were not; nor were dogs, ferrets, or other animals kept for sport or amusements, and not for food. Then it was held that a man could not be indicted for stealing a box with charters in it, for the charters were realty, as they related to the land, and the box followed the nature of the charters. Then it came to be laid down that, as to things which were the proper subjects of larceny, it was necessary to constitute the crime, that they should be taken out of the possession, in the sense of the bodily custody, of the owner; and that when once the owner had delivered over the bodily custody to another, as to a bailee by way of loan, or on deposit for safe custody or for the purpose of carriage, etc., there could be no theft by the person in possession merely appropriating the goods to his own use. But if a

carrier determined the bailment, by breaking bulk, and then carried away the separate articles, he was guilty of theft. Finally, it became settled law that choses in action, such as debts, money due on bond, etc., as well as the documents of title relating to choses in action, were not the subjects of larceny.

From time to time the various modes of fraudulently taking the property of another, which had been ruled not to be theft, were made the subjects of statutory offences. The enactments of this kind contained in various previous statutes were (with amendments) incorporated in the consolidating Act of 1861 (the Larceny Act, 1861, 24 & 25 Vict. c. 96). But the piecemeal character of the legislation is still preserved, and there is still a technical—and to some extent substantial—difference in that some of the statutory crimes are made felonies, while others are misdemeanours. And the law as to fraudulent appropriation, as well as to possession, with knowledge, of property stolen or fraudulently appropriated, is extended by the Acts of 1868, 1896, and 1901 (31 & 32 Vict. c. 116; 59 & 60 Vict. c. 52; and 1 Edw. 7. c. 10).

By the Larceny Act, 1861, simple larceny, which impliedly is treated as a felony, is punishable by penal servitude for three years, or imprisonment for any term not exceeding two years, with or without hard labour; and if by a male under sixteen, with or without whipping (sect. 4).

The offence is aggravated in case of a previous conviction for felony, or of an indictable misdemeanour under the Act, or of the offender having been twice summarily convicted of any of the offences punishable under certain Acts (sects. 7–9).

By sect. 10, a person stealing a horse, etc., bull, cow, etc., ram, ewe, sheep, or lamb, is guilty of felony, and liable to penal servitude up to fourteen years, or imprisonment for a term not exceeding two years, with or without hard labour.

By sect. 11, killing an animal with intent to steal the carcase or skin, is felony, and the culprit is liable to the

same punishment as if he had been convicted of feloniously stealing the animal, provided that offence would have amounted to felony.

By sects. 12-16, the unlawful killing or hunting of deer and cognate offences are made punishable as felony, or otherwise according to circumstances. And by sect. 17, the unlawful killing of hares or rabbits in a warren, if done at night, is a misdemeanour; or, if in the daytime, is punishable by a fine.

By sect. 18, stealing a dog is a misdemeanour, rendering the offender liable to imprisonment for a term not exceeding eighteen months, with or without hard labour. By sect. 19, the possession (with knowledge) of a stolen dog or skin of a dog renders the possessor liable to a fine of £20; and a subsequent offence, after conviction, is a misdemeanour, with liability to imprisonment for eighteen months, with or without hard labour. And by sect. 20, corruptly taking money for restoring a lost dog incurs liability to imprisonment for a term not exceeding eighteen months, with or without hard labour.

By sect. 21, stealing a bird, beast, or other animal ordinarily kept in a state of confinement, or for any domestic purpose, not being the subject of larceny at common law, renders the offender liable to imprisonment for six months, or a fine up to £20; and, on a second conviction, to imprisonment with hard labour for a term not exceeding twelve months. And by sect. 22, possession (with guilty knowledge) of such bird, or beast, or skin, or plumage thereof, renders the possessor liable to forfeiture of the same for a first offence, and, on a subsequent offence, to the same punishment as for stealing.

Sects. 23-26 are directed against the unlawful taking of house-doves or pigeons, and fish and oysters in private waters or fisheries. The unlawful taking, etc., of house-doves renders the offender liable to a penalty. The unlawful taking etc., of fish in private water, running through land adjoining the owner's dwelling-house, is a misdemeanour; and in any other private water renders the offender liable

to a fine, or the seizure of his tackle; and the stealing of oysters from an oyster-bed sufficiently marked out or known is a felony, rendering the offender liable to punishment as for simple larceny.

Sects. 27-30 are directed against the stealing or fraudulent destruction of written instruments; and the offender—whether the instrument is a document of title to lands, or is a valuable security other than a document of title to lands, or is a will or codicil, or a document belonging to a Court of Record—is guilty of felony.

Sects. 31-37 deal with the offences of stealing or destroying things growing on the land. Where the thing is a fixture to a house, or a tree in pleasure grounds, to the value of £1 or upwards, the offence is felony, punishable as simple larceny; and in other cases is punishable by fine or imprisonment, aggravated, and in some cases made felony, upon a second conviction.

Larceny of ore from mines is made felony by sects. 38 and 39.

Robbery from the person is a felony, punishable with penal servitude up to fourteen years (sect. 40). If the jury do not find the robbery proved, they may find the defendant guilty of an assault with intent to rob (sect. 41). Assaults with intent to rob are punishable with penal servitude for three years or imprisonment; but if aggravated by being committed by a person armed with an offensive weapon, or by two or more persons in company, may be punished with penal servitude for life, or any term not less than three years, etc.

Persons sending threatening letters, or otherwise making threats to extort money, are guilty of felony; and, if the threat is to accuse of an infamous crime, are punishable with penal servitude for life, etc. (sects 44-47).

So it is felony, punishable with penal servitude for life, etc., for any person, by threats or unlawful violence or restraint, to induce another person to execute an instrument to be used as a valuable security (sects. 48, 49).

Theft, with burglary, is an aggravated form of larceny.

At common law, burglary is the breaking and entering of the dwelling-house of another in the night-time, with intent to commit a felony therein. At common law, a church may be the subject of burglary. By sect. 50 of the above statute (24 & 25 Vict. c. 96), the commission of a felony in a church or chapel, and breaking out of the same, renders the offender liable to penal servitude for life, etc.; and by sect. 51, a person entering the dwelling-house of another, with intent to commit a felony, or committing a felony therein, and in either case breaking out of the dwelling-house by night, is guilty of burglary. By sect. 52, a person committing burglary is liable to be sentenced to penal servitude for life. By sect. 54, entering a dwelling-house by night, with intent to commit a felony, renders the offender liable to be sentenced to penal servitude for seven years, etc. And by sect. 55, breaking into a building within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof (*i.e.* not being in communication therewith, either immediately or by a covered and inclosed passage), incurs liability to penal servitude extending to fourteen years. And by sect. 56, breaking into a shop or warehouse, and committing felony therein, incurs the like liability.

By sect. 57, any person breaking into a dwelling-house, church, shop, etc., with intent to commit felony therein, is guilty of felony, and liable to penal servitude not exceeding seven years, etc. By sect. 58, a person found at night armed with an instrument with intent to break into a dwelling-house or other building whatsoever, or found by night disguised, with intent to commit felony, is guilty of a misdemeanour, and liable to penal servitude for three years, etc. And the same, after previous conviction, renders the offender liable to penal servitude for ten years, etc.

By sect. 60, stealing in a dwelling-house a chattel, money, or valuable security to the value of £5; or (by sect. 61) stealing anything in the house, and putting any person therein in bodily fear by menace; or (by sect. 62) stealing in a manufactory stuff in the process of

manufacture, is felony, and renders the offender liable to penal servitude up to fourteen years.

As to larceny in ships, wharfs, etc., it is enacted (by sect. 63) that stealing any goods in any vessel, barge, etc., in port, or upon a navigable river or canal, etc.; or (by sect. 64) stealing any part of a vessel, etc., in distress, is guilty of felony, and liable to penal servitude up to fourteen years. And (by sects. 65 and 66) persons in possession of any articles belonging to a ship in distress or cast ashore, or exposing the same for sale, and not satisfying the magistrate that he came lawfully by the same, may, on conviction, be imprisoned, with hard labour, for a term not exceeding six months, besides forfeiting a sum not exceeding £20 over and above the value of the goods.

Sects. 67-73 of the Act deal with larceny or embezzlement by clerks, servants, or persons in the public service. The effect of these sections is to put embezzlement by such persons practically on the same footing with larceny. The difficulty at common law was that an act which did not take goods out of the possession of the owner could not be larceny; and this had been partially remedied by statutes which, in certain circumstances, made embezzlement larceny. It then frequently happened that persons guilty of theft were acquitted because they had been indicted for embezzlement, and persons guilty of embezzlement were acquitted because they had been indicted for theft. This miscarriage is now provided against by sect. 72 of the Act, incorporating, with amendments, a section of an Act of 1851 (14 & 15 Vict. c. 100, s. 13). By this section, if upon an indictment for embezzlement the jury find the prisoner guilty of larceny, they may find a verdict to that effect, and the prisoner may be sentenced accordingly. This, as Sir J. Stephen observes, still leaves the difficulty that, if the judge wrongly direct a verdict for embezzlement, and the jury find accordingly, the conviction may be quashed upon a case reserved.

By sect. 2 of the Larceny Act, 1868 (31 & 32 Vict. c. 116), the provisions of the Criminal Justice Act, 1855 (18 & 19

Vict. c. 126) authorising summary conviction, are made to apply to embezzlement by clerks or servants, etc., under the above-mentioned sections 67-73 of the Larceny Act, 1861.

By sect. 74 of the Act of 1861, stealing by a lodger or tenant of a chattel or fixture, let to be used by him with the house or lodging, is a felony, punishable by imprisonment for a term not exceeding two years, etc., and if the value of the thing exceeds £5, the punishment may extend to seven years' penal servitude.

Embezzlement by bankers and other agents was dealt with by sects. 75 and 76 of the Act of 1861. These are repealed by the Larceny Act, 1901 (1 Edw. 7. c. 10), and a more general enactment substituted as follows:—

“(a) Whosoever being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property, or any part thereof, or any proceeds thereof; or (b) having, either solely or jointly with any other person, received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property, or any part thereof, or any proceeds thereof, shall be guilty of a misdemeanour, and be liable, on conviction, to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years.”

This is not to apply to a trustee on an express trust created by deed or will, or any mortgagee of property.

Sects. 77-79 of the Act of 1861 deal with fraudulent malversation of property by factors and attorneys; and, although these sections are not repealed, the acts dealt with are probably covered by the above Act of 1901.

Sect. 80 of the Act of 1861 appears to cover the case of an express trust which was excepted from the above provision of the Act of 1901. The section is as follows:—

“Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person,

or for any public or charitable purpose, shall, with intent to defraud, convert, or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property, or any part thereof, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned: Provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of Her Majesty's Attorney-General, or, in case that office be vacant, of Her Majesty's Solicitor-General: Provided also, that where any civil proceedings shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceedings shall commence any prosecution under this section without the sanction of the Court or judge before whom such civil proceedings shall have been had or shall be pending."

By sects. 81-84 of the same Act, various fraudulent acts or statements done or made by directors or officers of a public company are made misdemeanours, punishable in the same way as frauds by bankers, etc. These include (sect. 81) fraudulent appropriation or misuse of property; (sect. 82) keeping fraudulent accounts; (sect. 83) wilful destruction or falsification of books, etc.; (sect. 84) publishing fraudulent statements. By sects. 85 and 86, provisions are made that the criminal liability is not to affect civil proceedings; but the disclosure upon compulsory process in a civil proceeding of any act involving criminal liability under these sections is to avoid the liability to a criminal prosecution for such act. The provisions as to fraudulent accounts and wilful destruction or falsification of books, etc., are extended so as to apply to clerks and other inferior officers or employees of the company or person employing them, by the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24).

By sects. 88-90 of the Act of 1861, the obtaining money

or valuable security by a false pretence, or by a fraud inducing another to execute a deed or instrument, is a misdemeanour, rendering the offender liable to be sentenced to penal servitude for three years, etc.

By sects. 91-99, receivers and abettors are made liable, speaking generally, to the same punishment as principal offenders, whether the principal crime is larceny or embezzlement.

The 100th section, briefly adverted to in a former chapter (xxx. sect. 6) as to title to personal property, must be explained here more at length. The section is as follows:—

“If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negociable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted

with the possession of goods or documents of title to goods for any misdemeanour against this Act."

The section embodies an enactment of 21 Hen. 8. c. 11, with an extension (first introduced in a now repealed Act of 1827, 7 & 8 Geo. 4. c. 29, s. 57) to the case of goods obtained by false pretences and to valuable securities or other property obtained by fraud. With regard to "goods" properly so called (viz. chattels personal other than things in action and money), the extension of the principle to goods obtained by fraud not amounting to larceny is in effect repealed by sect. 24 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which is as follows:—

"(1) Where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

"(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud, or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

"(3) The provisions of this section do not apply to Scotland."

This latter Act does not apply to negotiable instruments; and it is clear, having regard to the proviso in sect. 100 of the Larceny Act, 1861, that the law as to negotiable instruments is left unaffected by the statutes. And so it was ruled by FIELD, J., in *Chichester v. Hill* (1883), 52 L. J. Q. B. 160. If the instrument has been negotiated to a *bonâ fide* holder for value, the holder's title is protected by the proviso. If it has not been so negotiated—*cadit quæstio*—there is nothing to affect the title of the original owner.

The corrupt taking of a reward for assisting to recover stolen property is a felony punishable with penal servitude up to seven years under the 101st section. And (under sect.

102) to advertise a reward in terms implying that no questions will be asked, etc., render the authors liable to a penalty of £50. The rest of the Act is occupied with provisions as to bringing offenders to justice, and procedure generally.

CHAPTER LXVI.

2. FORGERY.

FORGERY at common law is treated by Bracton only in reference to the crime of forging seals of State, which was treason. At a later period various forgeries came to be treated as misdemeanours, and the definition of Blackstone of forgery at common law, as "the making or alteration of a writing to the prejudice of another man's right," has been generally accepted: *R. v. Riley* (1896), 1 Q.B. 309; 65 L. J. M. C. 74.

The statute law relating to forgery, contained in previous statutes, was consolidated by the Forgery Act, 1861 (24 & 25 Vict. c. 98). The enactments in this Act comprise various classes of writing, or instruments, the forgery of which is made felony involving liability to penal servitude, in many cases for life and in other cases for various terms, with the alternative of imprisonment with or without hard labour. The classes of instruments or writings comprise seals of State (sect. 1); transfers of stock, etc. (sects. 2-6); India bonds (sect. 7); exchequer bills, etc. (sects. 8-11); bank-notes, and engraving plates, etc., relative thereto; stock of a body corporate, etc. (sects. 12-19); deeds, wills, etc. (sects. 20-26); records and instruments of evidence, etc. (sects. 27-29); Court rolls (sect. 30); register of deeds (sect. 31); orders, etc., of justices of the peace (sect. 32); official documents purporting to be in the name of the Accountant-General, etc. (sect. 33); recognizances, etc. (sect. 34); marriage licences (sect. 35); registers of births, deaths, and marriages (sects. 35-37). Under most of these sections the uttering or using of the forged instrument, knowing it

to be forged, is a felony, punishable in like manner with the forgery itself; and, by sect 38, demanding property upon a forged instrument, knowing the same to be forged, is a felony, punishable with penal servitude up to fourteen years, etc. There are (in sects. 39–56) various provisions as to procedure, etc., for the effective operation of the Act.

There are various provisions, as well in earlier as in subsequent Acts, relating to forgery of particular classes of instruments, many of which would be forgeries at common law, or covered by some of the provisions of the general Act of 1861. Of these some of the more important are the following :—

The forging or fraudulent uttering of a forged certificate under the India Stock Transfer Act, 1862 (25 & 26 Vict. c. 7), or the India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73), or personating the owner of India stock, is a felony under these Acts. The forgery of any instrument, or use (with knowledge) of any forged instrument in proceedings under the Declaration of Title Act, 1862 (25 & 26 Vict. c. 67), is a felony, punishable with penal servitude, which may amount to a life sentence, under sect. 45 of that Act. Forgery of exchequer bills or bonds under the Exchequer Bills and Bonds Act, 1866 (29 & 30 Vict. c. 25), is felony under sect. 15 of that Act. Forging share-warrants, or the plates for engraving such warrants, is felony under sects. 34 and 36 of the Companies Act, 1867 (30 & 31 Vict. c. 131). By the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37, s. 4), extended by the Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), the forgery of a document purporting to be one of those which are made *prima facie* evidence by either of these Acts, or the tender in evidence of any such document, knowing it to be forged, is a felony, rendering the offender liable to penal servitude, etc. Forgery of stamps, etc., under the Local Stamp Act, 1869 (32 & 33 Vict. c. 49), is a felony involving liability to penal servitude up to five years, etc., under sect. 8 of the Act. By sect. 19 of the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), consolidated stock of the Metropolitan

Board of Works is capital stock within the meaning of the Forgery Act, 1861; and by sect. 21 of the same Act, the fraudulent issue, by a clerk or officer of the Board, of a dividend warrant, etc., is a felony, punishable by penal servitude up to seven years, etc. By the Forgery Act, 1870 (33 & 34 Vict. c. 58), the forgery of a stock certificate, or personating the owner of such stock, or forging a plate, etc., to be used in engraving a stock certificate, is a felony, punishable with penal servitude, etc. Forgery of the signature or seal authenticating a marriage certificate is a felony, punishable with penal servitude for life, under sect. 15 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1871 (34 & 35 Vict. c. 49). By the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44, s. 12), the provisions of the Forgery Act, 1861, with reference to the Accountant-General, etc., apply to the Paymaster-General. Forgery of stamps under the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), is a felony, punishable with penal servitude up to seven years, etc., under sect. 26 of that Act. Forgery of stamps under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), is likewise punishable under sect. 113 of that Act. Forging the name or signature of a Commissioner of the Customs, etc., is a felony under sect. 28 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36). The enactments of the Forgery Act, 1861, relating to exchequer bills, apply to treasury bills under the Treasury Bills Act, 1877 (40 & 41 Vict. c. 2, s. 10). The enactments of the Forgery Act, 1861, and the Forgery Act, 1870, relating to stock of a body corporate and stock certificates, apply, by the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59, s. 21), to colonial stock under that Act. Forgery of a money order under the Post Office (Money Orders) Act, 1880 (43 & 44 Vict. c. 33), is, by sect. 3, equivalent to forgery of a cheque. Forging the signature of a Commissioner for Oaths, or fraudulently using an affidavit with such signature, is a felony, punishable with penal servitude up to seven years, etc., under the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10, s. 8).

Forgery of stamps, etc., is a felony, punishable with penal servitude up to fourteen years, etc., under sects. 13 and 18 of the Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38). There are numerous sections under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), relating to the forgery of documents, or use (with knowledge) of forged documents, in some cases made felony, and in others misdemeanours, with various provisions as to punishment. There are other enactments relating to trade marks, merchandise marks on bags of hops, etc., labels on packets of manufactured tobacco, etc., signature to picture under the Fine Arts Copyright Act, 1861, etc., etc. These, although partly intended for protection of the property of the person entitled to use the mark, are primarily designed for the protection of the public from deception, and some of the enactments have been already set out in dealing with offences of a public nature (p. 531, *et seq.*, *ante*).

CHAPTER LXVII.

3. MALICIOUS DAMAGE TO PROPERTY.

OF the crimes under this head, one of the most important is that which has been commonly known as *arson*. Arson has been described as "the malicious and voluntary burning of the house of another by night or day." This was a felony at common law. Possibly it did not occur to the authors of this definition that a person might, with felonious or fraudulent intent, set fire to his own house; but this and other varieties of the crime have been amply set forth in statutory enactments, which are consolidated in the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97).

By sect. 1 of the Act, a person who unlawfully and maliciously sets fire to a church or other place of Divine worship is guilty of felony, and liable to be sentenced to penal servitude for life, or for a term not less than three years, or to be imprisoned for a term not exceeding two years,

with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

By sect. 2, unlawfully and maliciously setting fire to a dwelling-house, any person being therein, is a felony, and the offender liable to the like punishment.

By sect. 3, unlawfully and maliciously setting fire to a house or other building of one of various classes specified, *with intent thereby to injure or defraud any person*, is a felony, and the offender liable to the like punishment.

By sect. 4, certain classes of buildings (such as railway stations, etc.), belonging to public undertakings are enumerated, the setting fire to which (maliciously, etc.) is a felony, punishable in like manner as above, without express reference to the intent to injure or defraud any person. And by sect. 5, there is a similar enactment with regard to any other public building, belonging to the King or to a county, etc., or belonging to any university or college, etc.

By sect. 6, setting fire (unlawfully and maliciously) to any buildings other than those before mentioned, is a felony, punishable in like manner with the offences under the previous sections, except that the term of penal servitude is limited to fourteen years. And by sect. 7, setting fire (unlawfully and maliciously) to anything in, against, or under a building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, is itself a felony, punishable with penal servitude up to fourteen years, with alternatives as before. And, by sect. 8, the attempt is a felony, and punishable in like manner with the offences under the two previous sections.

By sect. 9, the malicious injury to a dwelling-house, any person being therein, or to a building, whereby the life of any person is endangered, is a felony, punishable with penal servitude for life, with alternatives as before. And by sect. 10, the placing or throwing of an explosive substance, with the intent to destroy or damage any building, etc., whether or not any explosion takes place, is a felony, punishable with penal servitude up to fourteen years, with alternatives as before.

By sect. 11 of the same Act, persons who, riotously and tumultuously assembled together, unlawfully and with force demolish or pull down and destroy, or begin to pull down or destroy, a church or other place of Divine worship, or a house, stable, farm-house, or building or manufactory, public building, or machinery employed in a manufactory or mine, or various other things of the like nature specified in the section, are guilty of felony, and liable to penal servitude, which may extend to a life sentence, with alternatives as before. And by sect. 12, persons who, riotously and tumultuously assembled together, injure any such building or thing specified in the preceding section, are guilty of a misdemeanour, and liable to penal servitude, which may extend to seven years, etc. And if a person is tried for felony under the 11th section, the jury may, if not satisfied that he is guilty of the felony, find him guilty of an offence under the 12th section, and he may be punished accordingly.

By sect. 13, tenants of houses, etc., maliciously injuring them, are guilty of a misdemeanour.

By sect. 14, maliciously destroying or damaging, with intent to render useless, certain goods, such as silk, woollen, etc., in process of manufacture, or similarly destroying or damaging the machinery of the manufacturer, is felony, rendering the offender liable to penal servitude for life, with the alternatives similar to those in the first section of the Act; and maliciously destroying or damaging, with intent to render useless, machines used in agriculture or in a manufacture other than those specified in the previous section, is a felony, punishable with penal servitude up to seven years, with alternatives as above.

Sects. 16-24 are directed against the malicious and unlawful destruction, by setting fire to the same or otherwise, of crops of corn, woods, plantations, heath, gorse, etc., and various other vegetable productions. Such offences generally amount to felony, punishable, in the discretion of the Court, with penal servitude, with the alternatives as above; but in certain minor cases of injury, the offence

is only punishable with a term of imprisonment, with or without hard labour, and, if by a male under sixteen, with or without whipping.

By sect. 25, malicious injury to fences, etc., is punishable, on a first offence, with a penalty not exceeding £5, besides the amount of the injury done; and, upon a second conviction, with imprisonment with hard labour for a term not exceeding twelve months.

By sects. 26-29, malicious injury to a mine or machinery, and attempts to set fire to a mine, are felonies punishable with penal servitude, limited to various terms, with the same alternatives as mentioned in the first section.

By sect. 30, malicious damage to a sea-bank, or bank of a canal, etc., whereby any land or building is in danger of being flooded, is a felony, punishable with penal servitude, which may extend to life, with the same alternatives. And by sect. 31, malicious damage to a sea-bank, or bank of a canal, etc., with intent to obstruct navigation, is a felony, punishable with penal servitude up to seven years, with the same alternatives.

By sect. 32, malicious injury to fish-ponds, etc. (extended to salmon rivers by the Salmon Fishery Act, 1873, 36 & 37 Vict. c. 71, s. 13), is a misdemeanour, punishable with penal servitude up to seven years, with the like alternatives.

By sect. 33, malicious injury to a bridge, viaduct, or aqueduct, over or under which a highway, railway, or canal passes, with intent to make the bridge, etc., dangerous or impassable, is a felony, punishable with penal servitude for three years, with alternatives as in the first section. And by sect. 34, the malicious destruction of a turnpike-gate or a toll-bar, etc., is a misdemeanour.

By sect. 35, malicious obstruction of a railway, or interference with points or signals with intent to upset carriages, etc., is a felony, punishable with penal servitude, which may extend to a life sentence, etc. By sect. 36, wilful omission or neglect, causing obstruction to a railway carriage, etc., is a misdemeanour, punishable with imprisonment up to two years, with or without hard labour. By

sect. 37, the malicious injury to telegraph apparatus is a misdemeanour, punishable, on indictment, with imprisonment up to two years, with or without hard labour; or, on summary conviction, with imprisonment up to three months, with or without hard labour, or with a fine up to £10. And the attempt, by an overt act, to commit the offence in sect. 37, is punishable, under sect. 38, with imprisonment up to three months, with or without hard labour, or with a fine up to £10.

By sect. 39, malicious injury to a work of art or book or manuscript in a museum, etc., is a misdemeanour, punishable with imprisonment up to six months, with or without hard labour, and if by a male under sixteen years, with or without whipping.

By sect. 40, the malicious killing or maiming of cattle is a felony, punishable with penal servitude, which may extend to fourteen years. And the malicious killing or wounding of other animals, being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, is punishable, on summary conviction, with imprisonment, with or without hard labour, up to six months, or by a fine (in the discretion of the justice) not exceeding the amount of £20 over and above the injury done, and on a second conviction, with imprisonment with hard labour for a term not exceeding twelve months.

By sects. 42 and 43, the malicious setting fire to, casting away, or otherwise destroying a ship, is felony, punishable with penal servitude, which may extend to a life sentence, or the alternative punishments as in the first section of the Act. By sects. 44 and 45, the attempt, by an overt act, to commit the offence in either of the two preceding sections is a felony, punishable with penal servitude up to fourteen years, with the like alternatives. By sect. 46, the malicious damage to a ship, with intent to render the same useless, is a felony, punishable with penal servitude up to seven years, with the like alternatives. By sect. 47, the malicious removal of signals, or exhibition of false signals, with intent to cause damage to ships, is a felony, punishable with penal servitude,

which may extend to a life sentence, with the like alternatives. And by sect. 48, the malicious removal of, or any act with intent to remove, a buoy, etc., used for the purpose of navigation, is a felony, punishable with penal servitude up to seven years, with the like alternatives. And by sect. 49, the malicious destruction of any part of a vessel in distress, wrecked or stranded, or of any goods belonging to her, is a felony, punishable with penal servitude up to fourteen years, or imprisonment up to two years, with or without hard labour.

By sect. 50, sending a threatening letter threatening to burn a house, building, agricultural produce, or ship, or to kill or wound any cattle, is felony, punishable with penal servitude up to ten years, with the alternatives mentioned in the first section.

Malicious injuries to property not provided for under previous sections are punishable under sects. 51-53. If the offence is committed at night, and the damage exceeds £5, the punishment may extend to penal servitude for five years; if in the daytime, and the damage exceeds £5, the punishment may extend to two years' imprisonment; and in other cases to two months, with the alternative, in the discretion of the justice, of a fine, besides compensation for the damage.

By sect. 54, making, or having in possession, gunpowder or other explosive substance, with the intent that a felony may be thereby committed, is a misdemeanour, punishable with imprisonment up to two years, with or without hard labour, and if the offender is a male under sixteen, with or without whipping.

By sect. 55, power is given to magistrates to issue a search-warrant of premises, upon reasonable suspicion of their being used for manufacturing or keeping explosives; etc., for felonious purposes.

By sect. 56, accessories before the fact, and persons aiding or abetting, are punishable as principals; and accessories after the fact to any felony under the Act are liable to imprisonment for a term up to two years, with or without hard labour.

CHAPTER LXVIII.

CRIMINAL PROCEDURE—COURTS OF CRIMINAL JURISDICTION.

THE theory of a criminal prosecution is that the King is the party prosecuting. It is, however, one of the many anomalies of English criminal procedure that—with the exception, perhaps, of the crime of treason—the King has no agent whose duty it is to prosecute. In other words, the office of public prosecutor—such as exists in Scotland, as well as in France and other European countries—has no existence in England. There is, indeed, under the Prosecution of Offences Acts, 1879 and 1884 (42 & 43 Vict. c. 22; 47 & 48 Vict. c. 58) a director of public prosecutions, who is the solicitor for the Treasury, and who acts under the superintendence of the Attorney-General. But his office is not that of a public prosecutor; nor is he under any duty to intervene in a prosecution. On the other hand, the injured person, or another preferring the accusation, may be bound over to prosecute—that is to say, to present a bill to the grand jury and to appear as a witness—and such private prosecutor is at common law liable for the costs of prosecution; although under an order of the Court, made under the authority of some one or more of a long list of statutes, costs may be ordered to be paid out of a public fund.

COURTS OF CRIMINAL JURISDICTION.

These may be classed as—

(A) *Courts of Ordinary Criminal Jurisdiction.*

(B) *Courts of Extraordinary Criminal Jurisdiction.*

A. COURTS OF ORDINARY CRIMINAL JURISDICTION.

The ordinary courts of criminal jurisdiction are the following:—

1. *The High Court of Justice*, as the successor under the Judicature Acts to the Court of King's Bench, has

jurisdiction (to be exercised, generally, in the King's Bench Division) to try all indictable offences against the law of England.

The criminal jurisdiction of the Court of King's Bench was concurrent with that of Courts of Oyer and Terminer and Gaol Delivery ; but in practice the jurisdiction was not generally exercised by the Court of King's Bench itself unless (1) the indictment was removed into the Court by *certiorari* ; (2) where an information of a misdemeanour has been filed in the Court ; (3) where the Court exercised a special statutory jurisdiction to try misdemeanours such as,—(a) wilful neglect to deliver or transmit writs for the election of Members of Parliament: Parliamentary Writs Act, 1813 (53 Geo. III. c. 89, s. 6) ; (b) oppression and crimes by governors of colonies, etc., out of Great Britain (11 Will. III. c. 12) ; (c) offences by servants of the Government (formerly of the East Indian Company) in India: East India Company Act, 1770 (10 Geo. III. c. 47, s. 4) ; East India Company Act, 1773 (13 Geo. III. c. 63, s. 39).

It is to be observed that besides the jurisdiction which the High Court of Justice has as successor to the Court of King's Bench, the judges of the High Court are (by sects. 16 and 29 of the Judicature Act, 1873), in effect, substituted for the judges to whom (with or without such other persons as have been associated with judges in such commissions) the commissions of assize and other commissions have been usually directed.

2. *Courts, acting under a Commission of Assize*, have jurisdiction to try such crimes as are cast to them for trial on a transcript of a Court of Record of the King's Bench Division of the High Court of Justice.

3 *A Court acting under a Commission of Oyer and Terminer and general Gaol Delivery* has jurisdiction to try any offence triable at common law or by statute in the county or other district for which the Court is commissioned, and not excluded from their jurisdiction. It has also jurisdiction under the Admiralty Offences Act, 1844 (7 & 8 Vict. c. 2), to try offences committed on the high seas.

4. *The Central Criminal Court* is a Court created by Commissions of Oyer and Terminer and Gaol Delivery issued under the authority of the Central Criminal Court Act, 1834 (4 & 5 Will. IV. c. 36). It has jurisdiction to try all treasons, murders, felonies, and misdemeanours committed within the city of London and county of Middlesex, and certain portions of the counties of Essex, Kent, and Surrey, or for which prisoners have been committed for trial to the gaol of Newgate.

The Central Criminal Court had also jurisdiction, under sect. 22 of the last-mentioned Act, to try any offences committed on the high seas, and other places within the jurisdiction of the old Court of Admiralty. That is to say, it had criminal jurisdiction coextensive with that of the old Court of Admiralty.

The Central Criminal Court is (by the Judicature Act, 1873) a branch of the High Court, and by the Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), has jurisdiction to try any offence removed to the Court by *certiorari* by a judge of the High Court under the powers of the last-mentioned Act. By the Jurisdiction in Homicides Act, 1862 (25 & 26 Vict. c. 65), the procedure, in cases of murder and manslaughter committed by persons subject to the Mutiny Act, is simplified and improved.

The persons who might be appointed judges of the Central Criminal Court under the powers of the Act of 1834 (as read along with the Judicature Acts) are the Lord Chancellor and Lord Keeper of the Great Seal, the judges for the time being of the High Court, the Dean of the Arches, the Aldermen of the City of London, the Recorder, the Common Serjeant, the judges of the Sheriff Court of the City of London, and any person or persons who had been Lord Chancellor, Lord Keeper, or a judge in the High Court, and such others as the Crown from time to time may appoint.

The Central Criminal Court may also, upon the suggestion of the Attorney-General, try an offence under the Corrupt Practices Prevention Acts, which has been removed

into the High Court by writ of *certiorari* issued at the instance of the Attorney-General.

The times of holding sessions of the Central Criminal Court are now regulated by orders made by any four or more of the judges of the High Court: the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68, s. 8). Under the existing rule, *twelve* sessions are held in the course of each year.

5. *Courts of Quarter Sessions* sit under Commissions of the Peace, and in accordance with long usage. The form of the Commission is now prescribed by the Order in Council of February 22, 1878, and is printed in Statutory Rules and Orders Revised (ed. 1904), vol. 1, tit. "Clerk of the Crown." The Commission authorises the justices to inquire of all manner of crimes, etc., of which justices of the peace may lawfully inquire, "and to hear and determine all and singular the crimes, trespasses, and offences aforesaid according to the laws and statutes of our realm, as in the like cases it has been accustomed or ought to be done." Their jurisdiction is limited by the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38).

By the last-mentioned Act (sect. 1), justices in sessions are restrained from trying any treason, murder, or capital felony, or any felony which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life (*a*), or any of the following offences: *i.e.* 1. Misprision of treason; 2. Offences against the King's title, prerogative, person, or government, or against either House of Parliament; 3. Offences subject to the penalties of *præmunire*; 4. Blasphemy and offences against religion; 5. Administering or taking unlawful oaths; 6. Perjury and subornation of perjury; 7. Making or suborning any other person to make a false oath, etc.; 8. Forgery; 9. Unlawfully and maliciously setting fire to crops, plantations, etc.; 10. Bigamy and offences against laws relating to marriage; 11. Abduction of women and girls; 12. Endeavouring to conceal the birth of a child; 13. Offences against the laws

(*a*) See the Penal Servitude Act, 1857 (20 & 21 Vict. c. 3, s. 2).

relating to bankrupts and insolvents; 14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels; 15. Bribery; 16. Unlawful combinations and conspiracies, except to commit offences which the justices have jurisdiction to try, when committed by one person; 17. Stealing or fraudulently taking, injuring, or destroying records or documents belonging to or relating to a proceeding in any court of justice; 18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or documents of title relating to lands, etc. These restrictions are not to interfere with the restrictions already imposed on the powers of justices acting within the limits of the jurisdiction of the Central Criminal Court Act, 1834 (4 & 5 Will. IV. c. 36). By the Burglary Act, 1896 (59 & 60 Vict. c. 57), a Court of Quarter Sessions has jurisdiction to try a person charged with burglary.

There are also various offences depending on particular statutes, which are not triable by quarter sessions. Such are offences against the False Personation Act, 1874 (37 & 38 Vict. c. 36, s. 3); offences against sect. 9 of the Night Poaching Act, 1828 (9 Geo. IV. c. 69); corrupt practices at elections, under the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102, s. 10), and various Acts applying the provisions of that Act; embezzlement, etc., under the provisions of the Larceny Act, 1861 (24 & 25 Vict. c. 96, ss. 77-86, and see s. 87), and the Larceny Act, 1901 (1 Edw. VII. c. 10); offences against the Official Secrets Act, 1889 (52 & 53 Vict. c. 52, see s. 6 (3)).

A trial of an indictment against a corporation cannot take place before a Court of Quarter Sessions. The reason appears to be that the corporation cannot appear by attorney in these Courts; and, for the same reason, an indictment against a corporation may always be removed by *certiorari* into the High Court. *R. v. Birmingham and Gloucester Railway Co.* (1840), 9 C. & P. 469, PARKE, B. Crown Office Rules, 1886, r. 29 (superseding 16 & 17 Vict. c. 30, s. 4).

Apart from the powers of the High Court as to transmission of cases by *certiorari*, Courts of Quarter Sessions

may themselves transmit to the assizes any indictment found before them which they have no jurisdiction to try, or which they consider may be more properly tried at assizes. This power, which is comprised in the Commission of the Peace, is confirmed by sect. 5 of the Assizes Relief Act, 1889 (52 & 53 Vict. c. 12). The same power is specifically given to quarter sessions within the limits of the jurisdiction of the Central Criminal Court: Central Criminal Court Act, 1834 (4 & 5 Will. IV. c. 36, s. 9).

A Court of Quarter Sessions has also an appellate jurisdiction in certain cases of summary convictions; and this may be exercised generally where the Court of Summary Jurisdiction orders an offender to be imprisoned without the option of a fine: the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 19).

Under the general name of Quarter Sessions may be classed Borough Sessions (including Recorders' Courts), which exercise within the limits of the borough the same jurisdiction as County Sessions within the limits of the county. A similar jurisdiction is exercised by the *London County Sessions*, which sit under the Middlesex Sessions Act, 1844 (7 & 8 Vict. c. 71), the Middlesex Sessions Act, 1859 (22 & 23 Vict. c. 4), and the Local Government Act, 1888 (51 & 52 Vict. c. 41).

6. *Courts of Summary Jurisdiction.*

There are a number of statutes which make offenders liable, upon a summary conviction before a justice or justices of the peace, to be imprisoned or fined or otherwise punished. The justice or justices authorised so to convict, and any justice or justices authorised by any statute to make an order for payment of money, with some punishment in default of payment, are comprised in the expression "Court of Summary Jurisdiction." The Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 13 (11)). The procedure of Courts of Summary Jurisdiction, and some of their powers, are defined by consolidating Acts, namely, the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the Summary

Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), and the Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22). Summary jurisdiction is entirely the creature of statutes, and is strictly limited by the statutes by which it is created.

The topic of summary jurisdiction will be again adverted to after describing the *modus operandi* of a criminal proceeding in the ordinary course of law.

B. COURTS OF EXTRAORDINARY CRIMINAL JURISDICTION.

Besides the ordinary courts of criminal jurisdiction, there are others, which, by reason of their jurisdiction being only called into play on rare occasions, or by reason of the jurisdiction affecting only a limited class of persons, may be called extraordinary.

Of these the most notable is—

The High Court of Parliament.

Besides their supreme legislative power, which, in times long past, has been exercised to punish particular persons for treason or felony, the Parliament is competent, in a judicial capacity, to try high crimes and misdemeanours. This jurisdiction may be constitutionally exercised in two ways—first, by impeachment; and secondly, by indictment.

As to impeachment, no such proceeding has occurred for more than a century, and the topic may be dismissed very briefly. The Commons act as prosecutors, having agreed upon articles of impeachment prepared by a committee of the House. The Lords act as judges.

Secondly, when a true bill of indictment for treason or felony has been found by a grand jury against a peer or a peeress, the accused has the privilege of being tried by his peers. If the true bill is found and the indictment can be tried during a session of Parliament, the indictment is removed into the House of Lords by *certiorari*, and there tried. When Parliament is not in session, the House of

Lords, as a judicial assembly, is represented by the Court of the Lord High Steward, and the indictment is removed by *certiorari* into his Court. In either case, whether Parliament is sitting or not, a Lord High Steward is appointed, *pro hac vice*, by the King's Commission under the Great Seal. The person appointed is himself a peer. If the trial takes place during a session of Parliament, the Lord High Steward is the chairman, voting with the rest in right of his peerage, but having no superior authority, whether as to law or fact. In the Court of the Lord High Steward held in recess, he is the sole judge of law, while the Lords summoned are the persons to try the facts.

Upon the trial of any peer or peeress, either for treason or misprision of treason, all the peers who have a right to sit and vote in Parliament must be duly summoned twenty days at least before the trial: the Treason Act, 1695 (7 & 8 Will. III. c. 3, s. 11).

Courts of Oxford and Cambridge Universities.

A special criminal jurisdiction, which in former times was of considerable extent, has been exercised by the Courts of the ancient universities of Oxford and Cambridge. There were many charters or letters patent from time to time granted to these universities, conferring criminal as well as civil jurisdiction upon their governing bodies similar to the privileges which had been long enjoyed by many foreign universities. And by an Act of Parliament passed in the year 1570 (13 Eliz. c. 29) the universities of Oxford and Cambridge respectively were expressly incorporated, and the letters patent which had been formerly granted to these universities were confirmed, and their chartered privileges made good as if they had been expressly enacted by the Act.

One of these privileges, which has been at various times brought into question, was this: where a scholar or privileged person was indicted of, or otherwise charged with, a criminal offence, the university authority might claim

“conusance” of it, and the case came to be tried in a Court of the University.

In Oxford the criminal jurisdiction of the Court of the Chancellor, under 18 Edw. I., has long been obsolete. Cases of felony and mayhem were always excepted from it; but, under several charters, beginning with that of 2 Hen. IV., they could be tried in the Court of the High Steward with the licence of the Lord Chancellor. No such licence has, for some centuries past, been granted; nor is any likely to be granted in the future.

By the Charter (April 1, 1522) granted by King Henry VIII. to the Chancellor and Scholars of the University of Oxford, the Chancellor, as well as the Vice-Chancellor and his deputies, are justices of the peace for the vill of Oxford and the counties Oxfordshire and Berks. By sect. 3 of the Universities Act, 1825 (6 Geo. IV. c. 97), common prostitutes wandering in the public walks, etc., within the precincts of the University of Oxford, were liable to be dealt with as idle and disorderly persons under the Vagrancy Act, 1824 (5 Geo. IV. c. 83). By the Oxford University (Justices) Act, 1886 (49 & 50 Vict. c. 31), to remove doubts respecting the sitting and acting of the Chancellor, Commissary (the Vice-Chancellor), and his deputy, as justices of the peace for Oxfordshire and Berks, it was enacted that they or any of them might sit in an appointed place within the precincts of the university and act as justices of the peace for those counties, and that such place should be deemed a petty sessional Court within the meaning of the Summary Jurisdiction Act, 1879, and to be situate within the county of Oxford or Berks as the case requires, and that any justice of the peace of either of those counties, as the case requires, might sit and act with them.

As to Cambridge, the right to claim “conusance” was one of various matters of difference between the authorities of the university and of the borough of Cambridge, which were, by

agreement between these bodies, referred to arbitration. The award (that of Sir John Patteson) was confirmed by the Cambridge Award Act, 1856 (19 & 20 Vict. c. xvii.). By sect. 18 of this Act, "the right of the university or any officer therein to claim "conusance" of any action or criminal proceeding wherein any person who is not a member of the university shall be a party shall cease and determine." The Vice-Chancellor's Court, however, exercised, until the year 1894, a summary jurisdiction over prostitutes found in public places. This summary jurisdiction was abolished by the Act of that year, 57 & 58 Vict. c. lx., s. 5. But by sect. 6 of the same Act, the 3rd section of the Universities Act, 1825, was extended so as to apply to the university and precincts of the University of Cambridge.

CHAPTER LXIX.

CRIMINAL PROCEEDINGS RESULTING IN A TRIAL BEFORE A JURY.

THESE proceedings are instituted under one or other of the following forms:—

1. Indictment.
2. Arraignment on Coroner's Inquisition.
3. Information.

1. *INDICTMENT* (the usual proceeding).

At common law a bill of indictment might be preferred to a grand jury by anybody without a previous inquiry before a justice of the peace; and if an indictment was preferred vexatiously, and the defendant thereby incurred expense and injury to character, there was no remedy, except an action for malicious prosecution. The rule still

applies to treason and offences which are felonies at common law. But with regard to various misdemeanours, the power of preferring an indictment is restricted by statute.

The Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), by sect. 1, enacts as follows :—

“No bill of indictment for any of the offences following ; viz.—

Perjury,
Subornation of perjury,
Conspiracy,
Obtaining money or other property by false pretences,
Keeping a gambling house,
Keeping a disorderly house, and
Any indecent assault,

shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the Superior Courts of Law at Westminster, or of Her Majesty's Attorney-General or Solicitor-General for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the Superior Courts of Law in Dublin, or of Her Majesty's Attorney-General or Solicitor-General for Ireland or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary authorised by [the Criminal Procedure Act, 1851] 14 & 15 Vict. c. 100, to direct a prosecution for perjury.”

By sect. 2 of the same Act, where a charge has been brought before a justice of the peace of any of the offences specified, if the justice refuse to commit or to bail the

person charged, he must take the recognizances of the person preparing the charge to prosecute, in the same manner as he would have done if he had committed the person charged.

To the offences above specified are added, by subsequent Acts, the following:—

Misdemeanour under Part II. of the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 18), as extended by sect. 163 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52):

Every libel or alleged libel, and every offence under the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60, s. 6):

All misdemeanours under the Criminal Law Amendment Act, 1885—for the protection of women and girls, etc.—(48 & 49 Vict. c. 69, s. 17):

Offences punishable by indictment under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28, s. 13); and

Misdemeanours under the Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15, s. 25).

Offences under the Prevention of Corruption Act, 1906 (6 Edw. VII., c. 34).

PRELIMINARY PROCEEDINGS.

Criminal proceedings in the ordinary course, are set on foot in one of three ways—

1. By arrest (without warrant) of the offender.
2. By warrant, and consequent arrest.
3. By summons.

1. A private person, in whose presence a felony is committed, has the duty imposed on him by law to arrest the felon: 2 Hawk. c. 12, s. 1. And *where a felony has been committed*, a private person is justified in arresting and giving into custody another person whom he has reasonable ground for believing to be the felon. *Per Lord TENTERDEN, C.J., Beckwith v. Philby* (1827), 6 B. & C. 635 (30 R. R. 484).

Where persons are actually engaged in an affray, or if

there is reasonable ground for believing that they intend to renew it, any person present is justified in arresting the combatants and giving them in charge to a constable or police officer to be brought before a magistrate, who may take security for keeping the peace. (See the judgment of PARKE, B., in *Timothy v. Simpson*, 1 Cr. M. & R. 757, approved by Lord COTTENHAM in *Price v. Seeley*, 10 Cl. & Fin. 28, at p. 36.)

A private person is further justified in arresting another who is about to commit felony or treason, or any act which would manifestly endanger human life, and detain him until the intent has presumably ceased: 2 Hawk. c. 12, s. 19.

A constable, *having reasonable ground to suspect* that a felony has been committed, is, by common law, authorised to detain the person suspected until inquiry can be made by the proper authorities. *Per* Lord TENTERDEN, C.J., *Beckwith v. Philby*, *supra*. The powers of a constable at common law, which are extended to police and prison officers under various statutes, are more extensive.

Various powers of arrest are expressly given by statute.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97, s. 61), a peace officer, or the owner of the property, or his servants, or persons authorised by him, may arrest without warrant a person found committing an offence against the Act. By the Night Poaching Act, 1828 (9 Geo. IV. c. 69, s. 2), offenders against the Act may be arrested by the owner of the land, or his servants. And by the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 104), and the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100, s. 66); large powers are given to constables and peace officers to apprehend persons loitering about at night, or whom there is good cause to suspect of having committed, or about to commit, a felony. In certain cases of persons found *in flagrante delicto*, the power of arrest is by statute extended to anybody. See the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 103); the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99, s. 31); the Customs Act, 1876 (39 & 40 Vict. c. 36,

s. 190); the Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 6); and the Prevention of Offences Act, 1851 (14 & 15 Vict. c. 19).

Where a criminal escapes from prison, through negligence of the prison officers, the gaoler or officers may retake him without warrant.

Where a contempt is committed in the face of a Court of Record, the judge may order the offender to be instantly arrested and imprisoned. The order may be given by parol, and is carried out without further proof.

Persons subject to discipline under the statutes relating to the Navy and Army are, of course, subject to the power of arrest expressed or implied in those statutes.

2. A *warrant* to arrest for an indictable offence, where applied for in the first instance, is obtained from a justice or justices of the peace upon a written and sworn information and complaint (11 & 12 Vict. c. 42, s. 8). The justice is bound, upon such information, to hear and consider the matter; and if he does so, and whether he grants or refuses the application, no Court has jurisdiction, by mandamus or otherwise (unless by express statute), to review his decision: see *R. v. Adamson* (1 Q. B. D. 241), and cases cited in notes to that case (15 R. C. 127 *et seq.*). The warrant must be executed within the county or place where the justice or justices issuing it have jurisdiction, or, in case of fresh pursuit, within seven miles of the border. Or it may be executed within any other county or place, after being endorsed by a justice or justices having jurisdiction there: see the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42, ss. 10, 11). By the same Act (sects. 13–15), provision is made for indorsing warrants so as to be available in the Isle of Man and the Channel Islands, and for indorsing English, Dutch, and Irish warrants, so as to be available in either country. And by the Police (Scotland) Act, 1857 (20 & 21 Vict. c. 72, s. 11), the warrant issued for one of the border counties (*i.e.* Northumberland, Cumberland, Berwick, Roxburgh, or Dumfries) may be executed by a constable appointed for that county under the Act, in any of the said border counties.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 165), a Court having bankruptcy jurisdiction has power to commit for trial the bankrupt or any other person, if the Court is of opinion there is good ground for believing that the bankrupt or such other person has been guilty of an offence which is made a misdemeanour by the statutes relating to bankruptcy; and the Court has all the powers of a stipendiary magistrate relating to this purpose.

3. Where the matter of the complaint or information is not an indictable offence, or where there is good reason to suppose that the person complained against is a law-abiding subject, it is the proper course for the magistrate, and it is in all cases within his discretion (*a*), to issue a *summons* in the first instance. In order to obtain a summons, it is not necessary that the information or complaint should be in writing or upon oath (11 & 12 Vict. c. 42, ss. 1 and 8).

Hearing of the Complaint.

On the appearance of the accused before the justice or justices, the witnesses are examined, with liberty to the accused to cross-examine, and the deposition of the witnesses and the voluntary statement (if any) of the accused taken down in writing and read over. The powers of summoning and the mode of examining witnesses are laid down by sects. 16 and 17 of the Indictable Evidence Act, 1848 (11 & 12 Vict. c. 42). By sect. 18 of the same Act, it is provided that after the examination of all the witnesses on the part of the prosecutor have been completed, the justice of the peace shall read over, or cause to be read over, the depositions, and say to the prisoner these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." By the Criminal Evidence Act, 1898 (61 &

(*a*) See the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42, s. 1).

62 Vict. c. 36), the accused may also tender himself as a witness, in which case he is examined on oath. In either case, what the prisoner says is taken down in writing, and may be used in evidence against him at the trial: *R. v. Bird*, 62 J. P. 760; 15 T. L. R. 26 (C. C. R.).

Commitment and Bail, etc.

The justice or justices, upon hearing and considering the application and evidence, may (in the ordinary course) either—

1. Dismiss the application and discharge the accused; or
2. Remand the accused; or
3. Commit the accused for trial.

In either of the latter alternatives the question may arise whether *bail* should be accepted to secure the further appearance of the accused.

By the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42, s. 23), it is enacted that the justice may in his discretion accept bail in a case where the accused is charged with felony, or an attempt to commit felony, or with various offences enumerated in the section, or with any misdemeanour, for the prosecution of which the costs may be allowed out of the county rate (a). In other cases the magistrate is bound, upon the accused producing sufficient surety, to admit him to bail: provided that no justice or justices of the peace shall admit any person to bail for treason, except by order of a Secretary of State or of the High Court of Justice (King's Bench Division), or a Judge of the High Court in vacation. The manner of admitting to bail is by taking the recognizance of the accused with two sufficient sureties, to secure that he shall appear at the time for trial, and surrender himself to take his trial accordingly.

The sureties giving the bail bond are responsible for the appearance of the accused at the trial, and have the

(a) Under this head are included a long list of misdemeanours under various statutes. See Archbold's Criminal Practice, 23rd ed., p. 277.

corresponding right to the custody of the accused. If, before the time fixed for trial, a person who has become bound in bail desires to be relieved of his responsibility, he must bring the accused before the justice, who will then commit the accused to prison or accept fresh bail.

If the justice refuse bail, application for admission to bail may be made to the King's Bench Division. The application is made, in the first instance, by summons before a judge at chambers for a writ of *habeas corpus*, or to show cause why the accused should not be admitted to bail, either before a judge at chambers or before a justice of the peace, in such amount as the judge may direct (C. O. R. 1906, r. 111).

The Indictment.

The accused being committed for trial (a), the next step is to frame a bill of indictment. This, unless in the case of a private prosecution, or unless the solicitor for the Treasury as director of public prosecutions has intervened, is the business of the clerk of assize (for the assizes), or of the clerk of the peace (for the sessions). In cases of difficulty, such as an indictment for obtaining money under false pretences, the assistance of counsel is usually obtained. The costs properly incurred in such a case will be payable out of the county fund pursuant to sect. 35 (5) of the Local Government Act, 1888 (51 & 52 Vict. c. 41). In the case of boroughs named in the third schedule of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and called "County Burghs," the expenses properly incurred are payable out of the borough fund under sect. 169 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 80). In the case of other boroughs (called "Quarter Sessions Boroughs") having a separate Court of Quarter Sessions,

(a) This phrase is here used to include the case of a person admitted to bail upon a recognizance to appear and take his trial before a judge and jury. This use of the phrase is in accordance with the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 27).

then expenses are payable out of the county funds pursuant to sect. 35 of the Local Government Act, 1888 (51 & 52 Vict. c. 41).

The drawing of an indictment is a matter of great nicety. The theory has always been, and still is, "that the facts and circumstances which constitute the offence must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an indictable offence or not, in order that he may demur or plead to the indictment accordingly; that he may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly; that he may be enabled to plead a conviction or acquittal to this indictment, in bar of another prosecution for the same offence; and that there may be no doubt as to the judgment which should be given if the defendant should be convicted." (Archbold's Criminal Pleading, cited in Stephens' General View of Criminal Law, 1863, at p. 180.) If any of these rules were infringed, the mistake might, according to the law before the Act of 1851, be fatal to the prosecution. The indictment might be quashed on motion, or might be demurred to. Or the objection might be successfully taken by motion after verdict in arrest of judgment or in a writ of error.

The consequence of an error was lessened in importance, though by no means avoided, by the provision of the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100, s. 1).

By this Act the Court was empowered, pending the trial, to amend the indictment, in case of a variance between the facts as stated in the indictment and the facts proved. This was, however, subject to the condition that the Court considered the variance not material to the merits of the case, and that the defendant could not be thereby prejudiced in his defence.

To show the inadequacy of this provision to prevent failure of justice by a quibble, Sir J. Fitzjames Stephen cites the case of *R. v. Frost* (1853), Dearsley C. C. R. 474, where the prisoner was indicted for night-poaching on the

lands of George William Frederic Charles, Duke of Cambridge. At the trial it appeared that the Duke was named George William, and there was no evidence as to any other names. The prosecutor asked leave to amend, and the sessions refused, leaving it to the jury to say whether they were satisfied of the identity of the person mentioned in the indictment with the person referred to in the evidence. The jury convicted, but the Court of Crown Cases Reserved quashed the conviction, on the ground that the prosecutor had not proved the averment as it stood in the indictment; although it was quite unnecessary in the indictment to have stated the Christian names at all: and that, after verdict, it would have been too late to make any amendment.

More effective for the purpose of avoiding quibbles are the various sections of the Act of 1851 (since formally repealed and replaced by enactments in the Great Penal Code of 1861—24 & 25 Vict. chapters 94–100). These enactments dispense with the statement in the indictment of various details, which had, according to the old decisions, been deemed essential. Other enactments are framed so that a person indicted for a certain offence may be convicted, according to the evidence, of an offence of an analogous kind, though legally coming under a different description. Of the former class of enactments, in their latest form, the following may be taken as examples:—

“In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and

then to charge the defendant as an accessory in the manner heretofore used and accustomed": The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100, s. 6).

So by sects. 42-44 of the Forgery Act, 1861 (24 & 25 Vict. c. 98), it is sufficient in an indictment for forging, etc., an instrument, to describe the instrument by any name or designation by which the same is usually known, or by its purport, without setting out a copy or *fac-simile*, or otherwise describing the same or the value thereof. And where an attempt to defraud is essential to the offence, it is sufficient to allege and prove the intent to defraud; it is unnecessary to allege or to prove the intent to defraud any particular person.

Of the latter class of enactments, the 72nd section of the Larceny Act, 1861 (24 & 25 Vict. c. 96), may be taken as an example. This enacts, in effect, that a person indicted for embezzlement, as a clerk, etc., is not to be acquitted if the offence proved is larceny of the property; or if indicted for larceny, is not to be acquitted if what is proved is in law fraudulent disposition or embezzlement of the property: but in either case he may be convicted of larceny or embezzlement, as the case may be.

The Grand Jury.

On the Court (sessions or assize court, as the case may be) being opened, the presiding judge or chairman charges the grand jury as to their duty on the bills of indictment. On the depositions before him he directs the grand jury as to whether a *prima facie* case for the prosecution is made out for the several bills. The grand jury then retire with the witnesses to the grand jury room, and consult upon their finding in the various cases. To find a good bill, the finding must be by the majority of the jurors, and that majority must consist of twelve at least. For this reason the number of persons serving upon the grand jury is always at least twelve, and never exceeds twenty-three. In finding a good bill the grand jury are not bound by any

rules of evidence. Their function is, like that of the coroner's jury, a survival of the inquest as distinguished from the judicial proceeding (a). On a good bill being found, the finding is indorsed upon the bill, and the bill so indorsed is delivered by the foreman in open Court. The *bill of indictment* has then become an *indictment* properly so called.

If the grand jurors at the sessions find a good bill in a case which the sessions have no jurisdiction to try, the proper course is to transmit the indictment to the assizes for trial, or for the judge of assize to remove it to his Court by *certiorari* under the 2nd section of the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38) (b).

The Trial.

A true bill having been found and returned into Court, the accused (who in the mean time has the right to have copies of the depositions upon which he is committed: 11 & 12 Vict. c. 42, s. 27) is placed in the dock; and the clerk of arraigns reads the indictment. The prisoner is then called on to say whether he be guilty or not of the offence charged.

This was formerly a critical step. If the prisoner, when called upon to plead, stood mute, it was, in a case of felony and treason, at least questionable whether the prisoner could be tried at all; certainly he could not be convicted, so as to incur forfeiture. It was probably on this account that the old savage devices for compelling a prisoner to plead were resorted to. These have long been obsolete; and, finally, by the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28, s. 2), it was enacted that if the accused stood mute of malice and would not answer directly, the Court might record a plea of "Not guilty," and the plea so recorded had the same effect as if the accused had so pleaded.

Before the plea involving the general issue—that is to say, a plea of "guilty" or "not guilty"—is recorded, a preliminary question may be raised by demurrer; or by

(a) See Fitzjames Stephen, *Criminal Law*, 1863, at p. 158.

(b) Archbold, *Criminal Practice*, ed. 1905, p. 102.

special pleas, such as "autrefois acquit," "autrefois convict," or "pardon." Demurrers are now seldom used, partly for the reason that the objection might be obviated by amendment, and partly for the reason that, after the verdict, it would be still open to bring up the objection to the Court for Crown Cases Reserved.

By the plea of "not guilty" being recorded the case is at issue, and a jury are impanelled to try it. Here comes in the power of challenge. The challenge may be to the *array*, i.e. to the whole number of jurors. This right is not often exercised in England, and only arises on the suggestion of partiality or misconduct in the sheriff who returns the jury.

The right of individual challenge varies according to the nature of the offence charged. In indictments for high treason the accused appear, according to the Treasons Act, 1695 (7 & 8 Will. III. c. 3, s. 2), to have had the right of peremptory challenge of thirty-five jurors. But by the Treason Act, 1800 (39 & 40 Geo. III. c. 93), the right is, so far as relates to all cases of high treason where the overt act charged is a direct attempt against the life of, or serious injury to the person of the King, reduced to the same right as in cases of a charge for murder. In these and all other felonies the right of peremptory challenge is limited to twenty: the Juries Act, 1825 (6 Geo. IV. c. 50, s. 29). By the same statute it is enacted the Crown shall only challenge for cause assigned. In misdemeanours there appears to be no right of challenge, but it is not unusual for the prosecutor to allow a juror to stand aside on an intimation on the part of the defence of a desire to challenge him.

The jury being impanelled and sworn, the prosecutor opens his case with a statement, by anticipation, of the substance of the evidence to be given by the witnesses for the prosecution, and putting in the documents on which the case for the prosecution is rested. The witnesses on the part of the Crown are then called, examined, cross-examined on the part of the defence, re-examined upon any points raised upon cross-examination, and examined by the Court.

The prosecutor then addresses the jury upon the case; and the defendant or his counsel, if he does not tender evidence, addresses the jury, having, in that case, the last word. If witnesses are called for the defence, they are examined, cross-examined, re-examined, and examined by the Court, and the prosecutor has then the right of reply. After all this, the presiding judge sums up the case in an address to the jury, who give their verdict, after retiring, if they think it necessary, for consultation amongst themselves. The verdict must be unanimous. If they cannot agree, after a sufficient time, in the opinion of the Court, has been given them for that purpose, they may, according to the modern practice (contrary to some of the old authorities), be discharged. Such discharge is not equivalent to an acquittal. *Winsor v. R.* (1866), L. R. 1 Q. B. 289, 390.

On a verdict of "guilty" the Court pronounces sentence according to law. On a verdict of "not guilty" the prisoner goes free, and cannot be tried again for the offence with which he was charged on the indictment.

2. ARRAIGNMENT ON CORONER'S INQUISITION.

Where an inquest has been held by the coroner, and the jury have (by a majority, which must consist of at least twelve) returned a verdict of murder or manslaughter against a certain person, the finding, under the hands and seals of the coroner and of the jurors who concur in the verdict, is equivalent to a true bill found by the grand jury. The coroner issues his warrant to arrest the person charged and binds over the witnesses to appear at the trial. The Coroner's Act, 1887 (50 & 51 Vict. c. 71, ss. 4, 5).

Although, in such a case, the person charged may be arraigned and tried upon the inquisition, it is the usual practice that a bill of indictment is also prepared and submitted to the grand jury. If a true bill is found, the prisoner is arraigned upon both at the same time. But if he is arraigned and tried upon one only, he may, when arraigned upon the other, plead *autrefois acquit*.

3. INFORMATION.

Information is a mode of setting in motion a criminal proceeding (*i.e.* a proceeding in the name of the King as the accuser) without the intervention of an inquisition either by the grand jury or the coroner and his jury. Consequently, it does not apply to treason or felony; for by the common law of England a man is not to be put to answer for such crimes unless the accusation is supported by the oath of twelve men: 2 Hawk. c. 26, s. 3; Archbold Criminal Practice, 23 ed., p. 142.

Informations *ex officio* are filed by the King's Attorney-General in the King's Bench Division of the High Court of Justice. In the vacancy of the Attorney-General, the information may be filed by the Solicitor-General. *Ex-officio* informations are now rare in England. Their proper objects are such misdemeanours not amounting to treason or misprision of treason as seriously tend to disturb or molest the King's government.

Criminal informations, other than those *ex officio*, are filed by the Master of the Crown Office by leave of the Court, obtained at the instance of some person applying on affidavit suggesting the offence. The practice of the Court is not to grant leave in cases which would be properly the subject of an information *ex officio*, for that is left to the discretion of the Attorney-General. It was formerly a common thing, at the instance of a private individual, to grant a criminal information for libel; but that is not now the practice, unless there is a suggestion of some mischief seriously affecting the public; or unless the application is made by a public officer whose conduct as such is impugned.

The application is made by counsel to a Divisional Court of the King's Bench. It is made by motion for an order *nisi* within a reasonable time after the offence complained of: Crown Office Rules, 1886, r. 48. If the application is made against a justice of the peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his

belief that the defendant was actuated by corrupt motives; and further, if for an unjust conviction, that the defendant was innocent of the charge. *Ibid.* It is also a condition precedent to such an application that a notice, containing a distinct statement of the grievances or acts of misconduct complained of, has been served personally upon the justice of the peace, or left at his residence with some member of his household, six days before the time named in it for making the application. *Ibid.* r. 47. It is in the discretion of the Court whether to grant or refuse the application. There is always the alternative of proceeding by indictment, provided the conditions of the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17) are satisfied, (a) and the grand jury find a true bill.

CHAPTER LXX.

PROCEDURE UNDER STATUTES AUTHORISING SUMMARY CONVICTION.

THESE statutes have been already referred to in describing "Courts of Summary Jurisdiction," at p. 600, *supra*.

In describing the proceedings, it is sufficient now to refer to the general Acts of 1848, 1879, 1884, and 1899 (11 & 12 Vict. c. 43; 42 & 43 Vict. c. 49; 47 & 48 Vict. c. 43; and 62 & 63 Vict. c. 22).

By the Act of 1848 (sect. 1), where information is laid before one or more justices of the peace that any person has committed, or is suspected to have committed, within the jurisdiction of the justice or justices, any offence for which he is liable upon summary conviction to be imprisoned, fined, or otherwise punished, and also in cases where a complaint is made to the justice or justices, upon which the justice or justices have authority to make an order for payment of money, the justice or justices may issue a summons

(a) See p. 600, *supra*.

(in the prescribed form) (*a*) directed to the person charged, stating shortly the matter of the information or complaint, and requiring him to appear at a specified time and place to answer the information or complaint. The summons must be served by a constable or other person to whom it is delivered, by delivering the same to the party personally, or by leaving it for him at his last or most usual place of abode, with some person there.

If the summons is not obeyed, the justice or justices may upon proof of the service of the summons, issue a warrant for apprehension of the person charged; or, upon information upon oath for an offence punishable upon conviction, the justice or justices may issue a warrant in the first instance (sect. 2) (*b*).

The justice or justices are further empowered to issue summonses, and, if necessary, warrants, to ensure the attendance of witnesses (sect. 7).

At the hearing of the complaint or information, the substance must be stated to the person charged, and he is asked if he has any cause to show why he should not be convicted. If he admits the truth of the charge, the justice or justices present may convict him or make an order against him accordingly; but if he does not admit the charge, the hearing proceeds upon evidence, and the justice or justices convict or make an order upon, or dismiss the charge, as the case may be. If they convict or make an order, a memorandum is made, and the conviction or order drawn up in due form. If they dismiss the charge, the defendant is entitled to a certificate, which is a bar to any subsequent proceeding in respect of the same matter (sect. 14).

Further sections give powers of adjournment, orders as to payment of costs, distress warrants, orders for commitment

(*a*) A set of forms is scheduled to the Act; but these have been superseded by the forms scheduled to the rules made by the Lord Chancellor under the authority of the Summary Procedure Act, 1879 (42 & 43 Vict. c. 49, s. 29). These will be conveniently found printed in the Magistrates Annual Practice (Stevens & Sons and Sweet & Maxwell).

(*b*) A form of warrant is scheduled to the rules mentioned in the last note.

to prison either directly or in default of payment of money, etc.

The proceedings being wholly statutory, it is essential that the statutes should be exactly followed; but there are provisions as to variance and other matters, designed to prevent a failure of justice on mere technicalities.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), extends the process of summary conviction to a large class of cases to which the previous Acts had no application.

This Act, moreover, introduced the principle of giving the option to the person charged of being dealt with summarily in many cases where, according to the former practice, the case would necessarily have been left to the assizes (sect. 13).

The sections of the Act (10–14) which allow this option distinguish the cases where the person charged is—

- (1) A “child” (in the opinion of the Court, under twelve years of age).
- (2) A “young person” (in the opinion of the Court, between twelve and sixteen).
- (3) An “adult” (in the opinion of the Court, of the age of sixteen years or upwards).

The offences in respect of which the option is given are described in the first and second columns of the first schedule of the Act, extended by the Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22, s. 1). Briefly, they consist of the various kinds of larceny and cognate offences; those in the second column being (speaking generally) limited to the value of forty shillings.

The 10th section deals with the case of a child charged before a Court of Summary Jurisdiction with any indictable offence other than homicide. In such a case, the Court, if they think it expedient to do so, and if the parent or guardian of the child so charged, when informed by the Court of his right to have the child tried by a jury, does not object to the child being dealt with summarily, may deal summarily with the offence. The sentence may be similar to that which might have been inflicted if the case had

been tried on indictment, provided that (a) a sentence of penal servitude shall not be passed; (b) imprisonment shall not exceed one month; (c) a fine shall not exceed forty shillings; (d) if the child is a male, the Court may order the child to be whipped with not more than six strokes of the birch-rod by a constable in presence of an inspector, and in the presence (if he desires to be present) of the parent or guardian of the child. The section does not prejudice the right of the Court, under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118, s. 15), to send the child to a reformatory or industrial school. Nor does it render punishable for an offence any child who is not, in the opinion of the Court, above the age of seven years, and of sufficient capacity to commit crime.

Sect. 11, as extended by the Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22, s. 2), deals with the case of a "young person" charged with any indictable offence other than homicide. If the Court, having regard to the character and antecedents of the person charged, the nature of the offence, and the circumstances, thinks it expedient to deal with the case summarily; and if the young person, when informed by the Court of his right to be tried by jury, consents to be dealt with summarily, the Court may deal with the case accordingly. They may then, in their discretion, adjudge the young person to pay a fine not exceeding £10, or be imprisoned, with or without hard labour, for a term not exceeding three months; and, if the young person is a male, and, in the opinion of the Court, under fourteen, may also, or, in substitution for other punishment, order whipping with not more than twelve strokes of a birch-rod, under similar conditions to the punishment in the case of a child.

Under either of the sections above mentioned the question must be formally put whether the parent or guardian, or the young person, as the case may be, desires to be tried by a jury, or does not object, or consents to the case being tried summarily. And, if the Court thinks fit, the meaning of the case being dealt with summarily must be explained.

Sects. 12 and 13 of the Act deal with the case of an adult. By the 12th section, where the adult is charged with an offence specified in the second column of the first schedule (*i.e.* with petty larceny and cognate offences of small value), the Court is empowered to deal with the offence summarily under conditions similar to those of the 11th section. In case of the offence being dealt with summarily, the sentence may be imprisonment up to three months, or a fine not exceeding £20. By the 13th section, where the adult is charged with an offence specified in the first column (*i.e.* larceny or cognate offences generally), if at the hearing the Court is satisfied that the evidence is sufficient to put the person on his trial for the offence, and that the case may properly be dealt with summarily, and the offence adequately punished by virtue of the powers under the Act, the Court shall cause the charge to be reduced into writing and read to the person charged, who is then (after a proper caution, as presently explained) asked whether he is guilty or not. If the person says he is guilty, the Court enters a plea of guilty and adjudges him to be imprisoned, with or without hard labour, for a term not exceeding six months. Before asking the person charged whether he is guilty or not, the Court must explain to him that he is not obliged to answer, and that if he pleads guilty he will be dealt with summarily, and that if he does not plead or answer, he will be dealt with (*i.e.* committed for trial at the assizes) in the usual course; and the Court may further explain to him the meaning of the case being dealt with summarily or of the alternative. And the Court is further to state to the person charged that he is not obliged to say anything; but that whatever he says will be taken down in writing, and may be used in evidence against him at his trial. If he does not plead guilty, whatever he says in answer is taken down in writing and transmitted with the depositions, to await the trial.

Where an adult is charged with an indictable offence specified in the schedule, and it appears to the Court that the offence is one which, owing to a previous conviction, is

punishable with penal servitude, the Court shall not deal with it summarily (sect. 14).

By sect. 16 the Court has a discretion, in case of a trifling offence punishable on summary conviction, to inflict a nominal punishment, or to discharge the accused conditionally on his giving security.

A person charged with an offence (other than an assault) for which he is liable on summary conviction to imprisonment for more than three months may, before the charge is gone into, claim to be tried by a jury, as if the offence were an indictable one; and the offence shall be prosecuted accordingly as if it were an indictable offence. In such a case it is the duty of the Court, before the charge is gone into, to inform the accused of his right to be tried by a jury, and to ask him whether he desires to be so tried (sect. 17).

When a person is sentenced by a Court of Summary Jurisdiction to imprisonment without the option of a fine, he has a right to appeal to Quarter Sessions (sect. 19).

The justices trying cases as a Court of Summary Jurisdiction, must sit in open Court: and when trying an indictable offence, must be a petty sessional Court sitting on a day appointed for trying indictable offences. When not a petty sessional Court, they may adjourn the hearing to the next practicable sitting of a petty sessional Court (sect. 20).

By sect. 29 of the Act the Lord Chancellor is empowered to make rules relating to—

- (a) The giving security under the Act.
- (b) The forms to be used under the Summary Jurisdiction Acts.
- (c) Costs under distress warrants.
- (d) Adapting to the provisions of the Act and the Act of 1848 the procedure of previous Acts relating to summary jurisdiction.
- (e) Forms of accounts.
- (f) Other matters for which rules are required to carry the Act into effect.

And the Lord Chancellor is expressly authorised to annul or add to any of the forms contained in the Summary Jurisdiction Act, 1848, or any forms relating to summary proceedings contained in any other Act.

The section contains the usual provision for the rules made under the power to be laid before Parliament.

The Summary Jurisdiction Act, 1884, is directed (speaking generally) to the object of providing that a uniform procedure shall be followed in all cases where by an Act of Parliament summary conviction is authorised. Accordingly, the special enactments relating to such procedure in a number of these Acts is repealed; and the procedure left to be regulated by the general Acts.

By the Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), the powers of the Act of 1879, to deal summarily, is (by sect. 1) extended as already mentioned. The category of offences comprised in the first schedule of the Act is extended to obtaining, or attempting to obtain, money or goods by false pretences; and by sect. 3 the Court is directed, before dealing summarily with such a case, to explain to the person charged what is meant by a false pretence.

CHAPTER LXXI.

CRIMINAL APPEAL.

ALTHOUGH, speaking generally, there is no right of appeal, properly so called, from a conviction and sentence on a criminal trial, there are, under strictly limited conditions, certain proceedings having the effect of an appeal. These are—

1. Case stated on question of law for Court of Crown Cases Reserved.
 2. Writ of error.
 3. New trial.
 4. Appeal from a Court of Summary Jurisdiction.
- c. 2 s

1. *CASE STATED FOR COURT OF CROWN CASES
RESERVED.*

By the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), it is enacted (sect. 1) that "when any person shall have been convicted of any treason, felony, or misdemeanour before any Court of Oyer and Terminer or Gaol Delivery, or Court of Quarter Sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of" the Court known as the Court for Crown Cases Reserved. This Court, under the Supreme Court of Judicature Act, 1873, and the Supreme Court of Judicature Act, 1881 (36 & 37 Vict. c. 66, s. 47, and 44 & 45 Vict. c. 68, s. 15), consists of five judges, of whom the Lord Chief Justice of England (unless disqualified by illness or otherwise) is one.

Where a case has been reserved on the ground of evidence improperly admitted and left by the presiding judge for the consideration of the jury, the Court will quash a verdict of conviction, although there is other evidence on which the verdict might have been supported: *R. v. Gibson* (1887), 18 Q. B. D. 537; 56 L. J. M. C. 49. There appears to be, as to the grounds on which a verdict may be set aside, no distinction between civil and criminal cases: *per* Lord COLERIDGE, C.J., in same case (18 Q. B. D. at p. 544).

There is no appeal from the decision of the Court of Crown Cases Reserved (36 & 37 Vict. c. 66, s. 47).

2. *WRIT OF ERROR.*

A writ of error, returnable in the King's Bench Division of the High Court, lies from all judgments of inferior Courts of Criminal Jurisdiction, including Courts of Assize, etc. The writ is now only allowed after the *fiat* of the Attorney-General has been first obtained (Crown Office Rules, 1886, r. 184). The writ is issued (by R. S. C.,

January 31, 1889) from the Crown Office Department of the King's Bench Division. It is directed to the judge or judges of a Court of Record requiring him or them to send the record and proceedings to the Court authorised to review the same, who are to examine the record, and to affirm or reverse the judgment according to law.

The discretion of the Attorney-General to give or withhold his *fiat* is absolute in all criminal cases: *per* SMITH, L. J., in *R. v. Comptroller of Patents* (1899), 1 Q. B. 906, 914. And it is the duty of the clerk of the Crown Office not to issue the writ without production of the *fiat*: *Castro v. Murray* (1875), L. R. 10 Ex. 213; 44 L. J. M. C. 70.

On similar conditions a writ of error from a judgment of the King's Bench Division in a criminal case may be issued returnable to the Court of Appeal: Crown Office Rules, 1886, r. 207. This is only competent for error apparent upon the record, as to which no question has been reserved for the Court of Crown Cases Reserved (56 & 57 Vict. c. 66, s. 47). From the judgment of the Court of Appeal, an appeal may be made to the House of Lords, the consent of the Attorney-General being first obtained (39 & 40 Vict. c. 59, s. 10).

It will easily be seen that a writ of error can only succeed where a serious mistake in point of law has been made in the recorded proceedings. In favour of the verdict of the jury every presumption is made as to the facts (whether expressly stated in the indictment or implied by reasonable intendment) necessary to support the verdict. Compare *R. v. Aspinall* (1876), 2 Q. B. D. 48; 46 L. J. M. C. 149; and *Bradlaugh v. R.* (1878), 3 Q. B. D. 607.

When the writ has been issued, there is in the subsequent proceedings a curious distinction between felony and misdemeanour. In a case of felony—where the Attorney-General does not, within eight days, file a “joinder in error” (in effect, a formal intimation that the Crown denies the existence of error)—the person under sentence will be discharged without further argument. In a case of

misdemeanour, no reversal of the original sentence can be entered without a judgment pronounced in open Court and a certificate from the Attorney-General that notice of the application for the writ has been given him.

In either case (felony or misdemeanour), if the Crown has joined in error, the case will, on the application of either party, be put in the Crown paper for argument. On the hearing, the duty of the Court is "merely to examine the record for substantial defects appearing on the face of the record, and not cured by verdict": *per* LAWRENCE, J., in *King v. R.* (1897), 61 J. P. 663; Bowen-Rowlands' *Crim. Proc.* p. 210.

3. *NEW TRIAL.*

The expression "new trial" implies that the application is made after verdict of conviction. A new trial cannot be had in a case of treason or felony (*a*). The application for a new trial may be made by a defendant who has been convicted of a misdemeanour on an indictment which has been preferred in or removed for trial into the King's Bench Division of the High Court, or on an information or inquisition. The application is made by motion to a Divisional Court for an order *nisi*. In cases tried in London or Middlesex the application must be made within eight days after the trial, or on the first subsequent day on which a Divisional Court sits to hear motions on the Crown side, etc. If the trial has been heard at the assizes, the application must be made within seven days after the last day of the sittings on the circuits for England and Wales (the time of vacations not being reckoned): C. O. R. 166. A new trial in a case of misdemeanour may be granted in order to fulfil the purposes of substantial justice: Chitty, *Criminal Law*, 2nd ed., p. 654, cited by WRIGHT, J., in *R. v. Berger* (1894), 1 Q. B. 823, 825. And in what is substantially a civil case, such as an indictment for obstruction of a highway, where there is a question as to the title to the

(*a*) *R. v. Murphy* (1868), L. R. 2 P. C. 535.

property, there appears to be no distinction as to the ground on which a new trial may be granted between such a case and any civil case: *R. v. Berger* (1894), 1 Q. B. 823.

In applying for a new trial, the applicant may move as an alternative for leave to enter judgment *non obstante veredicto* (C. O. R. 166); but it appears that, whether the alternative is asked for or not, the Court has power in its discretion to make such an order: *per LUSH, J., R. v. Flatts* (1879), 28 W. R. 915; 48 L. J. Q. B. 848.

It is also in the power of the Court, on an application for a new trial, to award a *venire de novo*, which is the proper order to make where there is no conclusive verdict of conviction; for instance, in the case of a special verdict, or a verdict which is shown to be vitiated by misconduct of the jury. It is the same order as that which the Court trying a case (whether of treason, felony, or misdemeanour) is accustomed to make where the jury cannot agree, and where it appears that there is no prospect of their agreeing upon a verdict.

From the judgment of the Divisional Court upon a motion to set aside or reverse a verdict or the judgment founded thereon, an appeal lies to the Court of Appeal under sect. 48 of the Superior Court of Judicature Act, 1873 (36 & 37 Vict. c. 66).

4. APPEAL FROM A COURT OF SUMMARY JURISDICTION.

Such an appeal may be either—

1. An appeal to General or Quarter Sessions; or
2. Appeal to a Superior Court on case stated.

1. *The appeal to General or Quarter Sessions* is an appeal properly so called.

This right of appeal is sometimes given by express enactment in the statute which authorises the class of cases to be dealt with summarily. By sect. 19 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the right is extended to all cases where a person is adjudged

by a Court of Summary Jurisdiction to be imprisoned without the option of a fine.

The conditions under which this appeal is prosecuted are laid down in sect. 31 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). These conditions apply to all such appeals, whether authorised by the Act of 1879, or by any previous or subsequent Act: the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43, s. 6).

The conditions, unless otherwise prescribed by the Act authorising the appeals, are these—

(1) The appeal is made to the general or quarter sessions held not less than fifteen days after the decision appealed against was given.

(2) The appellant, within seven days of the decision, gives notice in writing to the other party and to the clerk of the Court of Summary Jurisdiction, stating his intention to appeal, and the general grounds of his appeal.

(3) The appellant, within three days after giving notice, must enter into a recognizance before a Court of Summary Jurisdiction, with or without sureties, or give other security, as that Court may direct, to try the appeal, and to abide the judgment and pay any costs awarded by the Court of Appeal.

(4) Where the appellant is in custody, the Court before whom he appears to enter a recognizance may, upon his entering into such recognizance, or give such other security as aforesaid, release him from custody.

(5) The Court of Appeal may affirm or reverse the decision and make any other order as if they had been the Court of Summary Jurisdiction appealed from, and may make such order as to costs as they think fit.

(6) If the decision is not confirmed, the clerk of the peace sends to the clerk of the Court of Summary Jurisdiction a memorandum of the decision of the Court of Appeal, and also indorses a memorandum on the conviction or other order appealed against.

(7) The notices as above must be signed by the appellant or his agent, and may be sent by registered letter.

2. *Appeal to a Superior Court on case stated.*—There is another, and quite distinct, method of obtaining a review of the determination of a Court of Summary Procedure. This is by a case stated for the opinion of a Superior Court under the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

By sect. 2 of the former Act, “either party to the proceeding before the justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing, within three days after the same, to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of one of the Superior Courts of Law to be named by the party applying.” The appellant must, within three days of receiving the case, transmit the case to the Court named, first giving notice in writing, with a copy of the case, to the respondent.

By sect. 3 a condition is made that the appellant is to enter into a recognizance before the justice or justices, with sureties if required, to prosecute the appeal and submit to the judgment; and if the appellant is in custody, provision is made for his liberation in the mean time.

By sect. 4 the justice or justices may, if they think the application frivolous, refuse to state a case, unless the application is made by or under the direction of the Attorney-General.

By sect. 5, on the refusal to state a case, the appellant may apply to the King’s Bench Division (upon an affidavit of the facts) for a rule calling upon the justice or justices, and also upon the respondent, to show cause why a case should not be stated. It is in the discretion of the Court of King’s Bench to grant the rule, or to make the rule absolute, as the case may be.

By sect. 6, the Court to whom the case is transmitted, decides upon the question of law, and gives judgment accordingly, and from their decision there is no appeal. They may make orders as to costs, provided that the

justice or justices who state a case shall not be liable for costs.

By sect. 14, the person appealing under this Act abandons his right to appeal to Quarter Sessions.

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 33), the provisions of the Act of 1857 are extended to all proceedings of a Court of Summary Jurisdiction, and the appeal may be not only on the ground that the determination, etc., is erroneous in point of law, but also that it is "in excess of jurisdiction."

It must at the same time be remembered that the powers of a Court of Summary Jurisdiction are entirely based upon statute: and if a proceeding is not merely "in excess of jurisdiction," but altogether without statutory authority, this enactment cannot supersede the ordinary jurisdiction of a Superior Court to quash the proceeding. In such a case the remedy would still be available, by writ of *certiorari*, to remove the judgment or proceeding of the justices for the purpose of quashing it.

The writ for this purpose must be applied for to a Divisional Court, or in vacation to a Judge in chambers, by motion for an order to show cause why the writ should not issue. The application must be made within six months of the judgment or proceeding to be quashed, and a copy of the judgment or proceeding is to be produced on the application. The Court, on cause being shown, may, in its discretion, quash the judgment or proceeding without further order. And in case of their doing so, no recognizance is necessary, such as is usually required as a condition of the writ of *certiorari* being issued; Crown Office Rules, 1906, 20-24.

INDEX.

ABANDONMENT

of voyage, determines liability of insurer, 366.
and total loss, in marine insurance, 379, 380.

ABDUCTION, &c., of women and girls, 562, 574, 575.

ABORTION, criminal act to procure, 567.

ABBRIDGMENT, whether an infringement of copyright, 233.

ABSCONDING DEBTORS ACT, 1870, application under, 490.

ABSOLUTE obligation to avoid causing damage, 416-422.

ACCESSION, title to personal property by, 227.

ACCOUNT, between partners, on dissolution, 405.

ACCRETION

of title, by acquisition of legal right, 143.
by survivorship of joint tenant, 170.
by person who has conveyed an equity acquiring the legal estate,
158.

ACT OF GOD, exception from liability, 353, 420, 421.

ACT OF STATE, seizure of ships by "Dutch Commissioners," 359.

ACTION, in civil procedure, described, 462 *et seq.*

ACTS OF BANKRUPTCY, 270, 493.

ACTS OF SETTLEMENT, declaring right of succession to Crown, 33.

ADJUSTMENT OF LOSSES, under insurance contract, 382-384.

ADMINISTRATION,

right of surviving husband by English law, 78.
husband by Scotch law, 80.
of the estate of a deceased person, 181, 217, 240, 284-297, 498-506.
of estate of a convict under Forfeiture Act, 1870...509.
of estates formerly under jurisdiction of Court of Chancery, 447.

ADMINISTRATION OF ESTATES ACT, 1869...187.

ADMIRALTY

Courts, their use of sources of Roman law, 2.
their jurisdiction, 441.
jurisdiction founded on arrest of the ship, 451.

ADMISSION of solicitor, requirements for, 454.

ADVOWSON,
a species of incorporeal property, 98.
the right described, 100, 101.

AFFRAY, 523, 524-526.

AGENCY, law, organisation of, 453.

AGENT,
with power of sale, 252-257.
mercantile, under Factors Acts, 255, 299.
contract of, generally, 337, 384-398.
insurable interest, 360.

AGREEMENT. *See* CONTRACT.

ALIEN,
status described, 41-43.
rights of inheritance, 188.
enemy incapable of contracting, 329.

ALIENATION,
title by, 194-196.
various modes of, 196-217.

ALLEGIANCE, duty of, 41.

AMBASSADOR, privileges of, 35.

ANCIENT LIGHTS, right explained, 103-104.

ANIMAL,
tame or wild, as subjects of property, 219, 223.
stealing, made criminal under Larceny Act, 1861...578.

ANTICIPATION, restraint on, does not prevent exercise of powers under Settled Land Acts, 155.

APPEAL
to H.M. in Council from Colonial Courts, 19.
from Superior Courts of first instance, 443, 485.
Court of, branch of Supreme Court under Judicature Acts, 445.
in civil proceedings, 485, 486.
to House of Lords, 490.
criminal, 625-632.

APPEARANCE,
jurisdiction founded on, 450.
mode of, described, 464.
judgment in default of, 465.

APPENDANT,
applied to right of common, 101.
the right described, 102.

APPURTENANT, right of common, distinguished from *Appendant*, 101.

ARBITRATION, clause in contract, stay of action under, 469.

ARMY, organisation of, 45.

ARRAIGNMENT, on coroner's inquisition, 604, 617.

ARREST
of ship, ground of Admiralty jurisdiction, 451.
of defendant about to leave England, when competent, 488-490.
under criminal process, 571.
without warrant, when justified, 571-574, 606-608.

ASSAULT, criminal, 562, 568-570.

- ASSETS, whole estate of deceased (by Act of 1869) is, for payment of creditors, 187.
- ASSIGNMENT, title to personal property by, 225, 259-269.
- "AT AND FROM," construction in policy of insurance, 367.
- ATTAINDER, effect of, as to inheritance, 188.
- ATTEMPTS TO COMMIT CRIMES, when criminal, 546.
- ATTORNEY-GENERAL, consent required to prosecution by indictment, under Vexatious Indictments Act, 1859...605.
- ATTORNEYS, practitioners in former Courts of Common Law, 453.
- AUCTIONEER, described, 389.
- AUSTIN, JOHN,
 borrows Erskine's definition of law, 1.
 how he explains "sovereignty," 1.
- AUXILIARY FORCES, 47.
- BAIL, duty of magistrate as to acceptance of, 610.
- BAILMENTS, 223, 336, 337, 347-357.
- BANKER'S LIEN, 300.
- BANKRUPTCY,
 title by, 194, 225, 269-274.
 agreement to avoid law of, void, 334.
 jurisdiction in, 449, 451.
 procedure in, 492-497.
- BANNS, when required for marriage, 59, 64, 65.
- BARRATRY, exception of, in contract of carriage of goods by sea, 352.
- BARRISTERS, origin and privileges of, 459-461.
- BASE FEE,
 described, 130.
 powers of person entitled to, under Settled Land Acts, 149.
- BASTARD,
 obligation of putative father to maintain, 86.
 has no right by inheritance, 87, 188.
- BEAST OF THE PLOUGH, when exempt from distress, 319.
- BENEFICIARY, under trust, his right, an estate in equity, 123.
- BENEFICIUM INVENTARII*, equivalent in English law, 502.
- BETTING, statutes relating to, 554-557.
- BIGAMY, described, 547.
- BILL OF EXCHANGE, described, 340.
- BILL OF LADING, 337, 350, 352.
- BILL OF SALE, 307-316.
- BILLS OF EXCHANGE ACT, 1882...264, 340.
- BLACKSTONE, his work referred to, 1, and *passim*.
- BLASPHEMY, offence at common law, 515.
- BOARD OF CONTROL, for India, in the time of the Company, 20.

BONA FIDE dealings with bankrupt, protected, 273, 274.

BOROUGH, municipal, created by charter, 49.

BRACTON,

lays down rule of representation in succession to land, 184.
his description of treason, 506.

BREACH OF TRUST, criminal, 582, 583.

BRIBERY,

and corrupt practices, 514.
of persons in judicial capacity, 518, 521.

BRIDGES (public),

provisions of Railways Clauses Consolidation Act, 1845...111
liability to repair, 112-113, 559, 560.

BRITISH INDIA, influence of English law in, 19-27.

BRITISH SUBJECT, described, 41.

BROKER,

described, 390
how business of, conducted, 390-395.

BUILDING LEASE, power to grant under Settled Land Acts, 150.

BUILDING SOCIETIES, statutes relating to, 52.

BURGLARY, at common law, and by statute, 578.

CABINET SYSTEM, name applied to undivided responsibility of Ministers of the Crown, 4.

CAMBRIDGE, "conusance" of actions or criminal proceedings as to persons not members of university, abolished, 604.

CANADA, part of, law based on old French law, 17.

CAPITAL MONEY, under Settled Land Acts, 152, 153.

CARE, obligation of, to avoid causing damage, 416, 422-425.

CARRIER,

contracts of, 337, 348-355.
his insurable interest, 361.

CAUSA, in Roman law, as giving binding effect to promise, 406.

CAUSA PROXIMA SPECTATUR, rule in marine insurance, 376-379.

CENTRAL CRIMINAL COURT, described, 597.

CERTIORARI,

jurisdiction of King's Bench in, 438.
now assigned to King's Bench Division, 448.

CESTUI QUE TRUST. *See* BENEFICIARY.

CHALLENGE TO FIGHT, a misdemeanour, 523, 526.

CHAMPERTY, ground of illegality in contract, 334.

CHANCELLOR, appointed for Ireland (1246), 11.

CHANCERY, Court of, before the Judicature Acts, 2.

CHANCERY DIVISION, matters specially appropriated to, 447.

CHANNEL ISLANDS, governed by their own laws, 16.

CHARGE OF DEBTS, in action for enforcing, receiver usually granted, on interlocutory application, 482.

- CHARGES on land and other property, 155, 159, 447, 482.
- CHARTER,
 ancient, explained by usage, 48.
 creating municipal borough, when valid, 49.
- CHARTERPARTY, contract by, 337, 348-350.
- CHATTELS, PERSONAL,
 described, 218.
 held on trust with land, how saleable, 153.
 rights in security over, 297-322.
- CHATTELS, REAL, character of, 218.
- CHILD,
 orders for custody, &c., of, in matrimonial causes, 69, 86, 88.
 parent and, status of, 83-87.
- CHOSE IN ACTION, sometimes applied to incorporeal personal property, 218.
- CHURCH, as established in Scotland, 8.
 England, 44.
 of England, privileged as to celebration of marriage in England, 60.
- CHURCHWARDENS,
 annual election of, 44.
 secular duties of, transferred to parish councils, 49.
- CIVIL LAW, influence of, in Scotland, 8.
- CLANDESTINE MARRIAGES,
 England, 59.
 Scotland, 65.
- CODES, for India, 26.
- COINAGE OFFENCES ACT, 1861...510.
- COKE, statement upon the effect of a recovery, 132.
- COLLEGIUM (or *universitas*), origin of corporation, 47.
- COLLISION,
 between ships, a ground of maritime lien, 320.
 particulars in action for, 472.
- COLONIAL MARRIAGES (DECEASED WIFE'S SISTER) ACT, 1906...82.
- COLONIES,
 how affected by English law, 16-19.
 legislative powers in, how constituted, 17.
- COMMISSION for appointment of Justices of the Peace, 40.
- COMMON,
 a species of incorporeal property, 98.
 rights of, described, 100
 Appendant, *Appurtenant*, and *In Gross*, distinguished, 101.
- COMMON LAW PROCEDURE ACT, 1854...180, 244.
- COMMONABLE BEASTS, "levant" and "couchant," explained, 102.
- COMPANIES ACTS, 1862-1900, constitute a special code, 52.
- COMPANIES CLAUSES ACTS, 1845-1889...50.
- COMPANY,
 East India, 19-22.
 incorporated under special Act, 50.
 Companies Acts, 52.

- COMPETITION, between trustee in bankruptcy and execution creditor, 273.
- COMPOUNDING felony, an offence, 518, 522.
- CONCEALMENT of birth, a misdemeanour, 567.
- CONDICTIO INDEBITI, obligation to refund payment made by mistake, 408, 414.
- CONDITIONAL FEE, 127, 326.
- CONFLICT OF LAWS, relating to marriage, 81, 82.
- CONQUEST (in Scotch law), equivalent to purchase in English law, 187.
- CONSANGUINITY, defined, 182.
- CONSENT,
 capacity of, relating to marriage, 55
 by common law, sufficient to constitute marriage, 57.
- CONSIDERATION,
 good or valuable, 198, 246.
 and promise generally, 337, 406, 407.
- CONSIGNEE, has an insurable interest, 360, 361.
- CONSPIRACY, 506, 544-546, 605.
- CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875...91, 540-542.
- CONTINGENT REMAINDER,
 Ferne's definition of, 160.
 explanation and effect of, 161-164.
- CONTRACT,
 title to personal property by, 225, 246 *et seq.*
 general principles of, 328-336.
 classified, 336, 337.
- CONTRIBUTORY, under Companies Acts, obligation of, 412.
- CONVEYANCE, by deed, 196-208.
- CONVEYANCING ACT, 1881...201, 202.
- CONVICT, generally capable of contracting, 329.
- CO-PARCENERS, described, 172-175.
- COPYHOLD,
 not affected by Act of Charles II. abolishing feudal tenures, 118.
 Act, 1894...119.
 no similar estate in Scotland, 121.
 how forfeiture incurred, 194.
 conveyance of, 209-212.
 may be disposed of by will, 213.
- COPYRIGHT, 228-234.
- CORONER (or CROWNER),
 his office, 39-41.
 arraignment on his inquest, 604, 617.
- CORPORATIONS, 47-54, 189.
- CORPOREAL things, described, 98.
- CORRUPT PRACTICES,
 made criminal by statute, 514, 547, 561.
 come under Vexatious Indictments Acts, 606
- COSTS, in civil proceedings, 486-488.
- COUNCIL OF TRENT, how marriage law affected by, 57, 58, 64.

COUNTY COUNCILS, are corporations under Local Government Act, 1894...49.

COUNTY COURTS,
formerly unimportant, 443.
as now organised, *ibid.*

COURTS (see also under various headings),
of criminal jurisdiction, 595-604.

COVENANT,
running with the land or otherwise, 145.
for title, &c., 201.

CREDITORS, frauds against, 506, 529-531.

CRICKET PITCH, trace of old system of land measurement, 120 *n.*

CRIME, 504 *et seq.*, *passim*.

CRIMINAL JURISDICTION, Courts of, 595-604.

CRIMINAL PROCEDURE, 595-632.

CROWN,
responsibility of ministers of, 4, 34.
succession to, 32-34.
servant of, holds office during pleasure, 35.
various prerogatives of, 35.
grant by, matter of public record, 207.
rights not affected by Act of Parliament unless so expressed, 359.
right of, as *ultimus hæres*, 503.
offences against, not now dealt with as treason, 506, 509-515.

CROWN CASES RESERVED, Court of, 626.

CRUELTY TO ANIMALS, Acts relating to, 560.

CRUELTY TO CHILDREN, Prevention of, Act, 1904...561, 566.

CURTESY,
husband's right of, 76, 81.
powers of tenant by, under Settled Land Acts, 149.

CUSTODY OF INFANTS ACT, 1873...83, 86.

CUSTOM,
how law arises out of, 6.
special, alienation by, 208-212.
title to personal property by, 225, 240.
"of the realm" relating to common carriers, 353.

DANGER, liability for act causing, 417.

DANGEROUS ANIMAL, liability of person harbouring, 416.

DATE of a deed, 202.

DE DONIS, Statute, 123-128 *et seq.*

DEAD BODY, nuisance relating to disposal of, 557.

DEBENTURE,
creating a charge on undertaking of company for public purposes, 51
of company, not affected by Bills of Sale Acts, 315.

DEBTS
by bond or covenant, 336, 338.
on account stated, 338, 339.
payable in course of administration, 283.
order of priority of, 290.
provable in bankruptcy, 496.

- DEBTORS ACTS, 1869 and 1878...492.
- DECEIT, action for, 435.
- DEED, conveyance by, 196-208.
- DEFAMATION
described, 431.
liability for, principles of, 431-435.
- DEFENCE, statement of, 471.
- DELEGATION of legislative powers, 3.
- DELIVERY of a deed, 203.
- DEPART WITH CONVOY, warranty to, in insurance policy, 370.
- DEPENDENCIES, how affected by English law, 16-19.
- DEPOSIT, bailment of, 336, 337.
- DESCENT,
title by, explained, 126, 181-185.
distinguished from purchase, 181.
- DESCRIPTION of goods, false, 532.
- DESIGN, new and original, 237.
- DETERMINABLE FEE, 127, 326.
- DEVASTAVIT by executors, 289.
- DEVIATION, effect of, upon insurance, 373-375.
- DEVISE
of lands on future contingency, 163.
alienation by, 212-217.
under Wills Act, 1837...213.
- DIGNITIES are incorporeal hereditaments, 98, 101.
- DIRECTORS, fraudulent statements by, criminal, 583.
- DISCHARGE of bankrupt, 495.
- DISCLOSURE of official secrets, offence of, 510, 513.
- DISCOVERY, dealt with under summons for directions, 475.
- DISORDERLY HOUSE, keeping, 605.
- DISSOLUTION of partnership, 404-406.
- DISTRESS for rent, 317-319, 431.
- DISTRIBUTION OF ASSETS in bankruptcy, 496.
- DISTRIBUTION, STATUTE OF, 282, 293.
effect of, stated, 294-297, 502.
- DISTRICT COUNCIL, a corporation under the Local Government Act, 1894...49.
- DIVISIONS of High Court of Justice, arrangement of, 447.
- DIVORCE,
how jurisdiction constituted, 67, 71.
Court of, and Matrimonial Causes, 441.
- DOCUMENTS, inspection of, under summons for directions, 475.
- DOG stealing a misdemeanour under Larceny Act, 222, 578.
- DOGS ACT, 1906...417.
- DOMESTIC SERVANT, implied terms of service, 91.

- DOMICILE**,
law of, in relation to marriage, 71, 81, 82, 150.
execution of will, 282.
bankruptcy, 451.
- DONATIO MORTIS CAUSÂ**, 291.
- DOWER**, widow's right to, 79.
- DRAMATIC AND MUSICAL COPYRIGHT**, 229-231.
- DRILLING**, illegal training and, 510, 512.
- DRUGS**, offences relating to sale of, 529, 535-538.
- EASEMENTS** of right of way, light, &c., 103, 223.
- EAST INDIA COMPANY**, constitution of, 19-22.
- ECCLESIASTICAL COURTS**,
their use of Roman law, 2.
jurisdiction formerly exercised by, 442.
their residuary jurisdiction, 445.
- ECCLESIASTICAL PERSONS**, *status* of, 44.
- EDUCATION**, obligation of parent, 85.
- EJECTMENT** a proceeding for the recovery of land, 180.
- ELECTORAL FRANCHISE**, ultimate sovereign authority vested in whole body of persons having, 3.
- ELIZABETH**, STATUTES OF, 199, 245, 306.
- EMBEZZLEMENT** under Larceny Acts, 581, 582.
- EMBLEMS**,
right to, 143-145, 147.
described, 226.
- EMPLOYERS AND WORKMEN**,
County Court jurisdiction, 92.
offences by persons in relation of, 529, 539-543.
- EMPLOYER'S LIABILITY**, 91-94.
- ENFRANCHISEMENT**, powers of, under Settled Land Acts, 150.
- ENGLISH LAW**, territories subject to influence of, 7-27.
- ENGRAVINGS**, copyright in, 229-231.
- ENTAIL**, strict, in Scotland, only broken by proceedings under modern Acts, 8.
- EQUITABLE ASSIGNMENT**, 267-269.
- EQUITABLE ESTATE** explained, 142.
- EQUITABLE EXECUTION**, jurisdiction of Court in, 440.
- EQUITABLE JURISDICTION** of Court, origin and subjects, 440.
- EQUITABLE MORTGAGE**,
distinguished from legal, 56.
described, 158.
- EQUITY**
included in "law" in the larger sense, 6.
concurrent jurisdiction (formerly) of Court of Chancery and Court of Exchequer, 438.
- EQUITY TO A SETTLEMENT**, a doctrine of the old Court of Chancery, 73.
- ERROR**, writ of, in criminal cases, 626-628.

ERSKINE, his Principles of Scotch Law, 1.

ESCAPE, an offence against public justice, 518.

ESCHEAT,

right of Crown to, 35.

title to lands by, 187, 188.

ESTATE,

freehold, in lands, tenements, and hereditaments 122-142.

in fee simple, in tail, or for life, 123.

legal and equitable, distinguished, 142, 156 *et seq.*

in land, less than freehold, 142-147.

for years, 142-146.

at will, 146, 147.

at sufferance, 147.

ESTOVERS, comprised in right of common, 101.

EVIDENCE

in civil proceedings, 478-480.

on criminal trial, 617.

EXCEPTED PERILS

in charterparty or bill of lading, 350, 351, 352.

in contract of insurance, 352, 376-379.

EXCHANGE,

powers of, under Settled Land Acts, 150

conveyance by, how effected, 205.

EXCHEQUER DIVISION of High Court, business specially committed to, 448.

EXECUTED AND EXECUTORY applied to contracts, 246.

EXECUTION, proceedings for, on judgment in civil action, 482-485.

EXECUTION CREDITOR,

his right in security over lands, 158, 159.

competition with trustee in bankruptcy, 273.

EXECUTIVE,

mode of exercise of sovereign authority, 3, 4.

officers, inferior, 38-41.

EXECUTOR,

described, 283.

de son tort, 288.

EXPLOSIVES, criminal manufacture or possession of, 567.

FACTOR, described, 389.

FACTORS ACTS, effect of, described, 254-257, 299, 300, 337.

FALSE IMPRISONMENT as a criminal offence, 562, 570-574.

FEARNE, his definition of Contingent Remainders, 160.

FEE SIMPLE ESTATES, descent of, 182-185.

FELONY,

a class of crime, 504.

distinguished from misdemeanour, 505.

FENCES, duty to maintain, 421.

FEOFFMENT, still a competent mode of conveyance, 204.

FEU, an estate still used in Scotland, 8, 121.

FEUDAL SYSTEM, origin and extinction of (in England), described, 114-119.

- FINANCE ACT, 1891...499.
- FINE, a proceeding invented to evade the statute *De Donis*, 123.
- FINE ARTS COPYRIGHT ACT, 1832 ..232.
- FINES AND RECOVERIES ACT, 135.
- FISHERY, nature of right explained, 105.
- FOOD AND DRUGS, offences relating to sale, &c., of, 529, 535-538.
- FORCEFUL ENTRY and detainer, 523, 526.
- FOREIGN COUNTRY, residence of plaintiff in, ground of requiring security for costs, 486.
- FOREIGN ENLISTMENT ACT, 1870...510, 514.
- FOREIGN JUDGMENT, effect in England, 491.
- FOREIGN MARRIAGE ACT, 1892...61.
- FOREIGNER. *See* ALIEN.
- FORESHORE, right to, 107.
- FORFEITURE,
 dissolution of corporation by, 53.
 title to land by, 193, 194.
 personalty by, 238.
- FORFEITURE ACT, 1870...118, 193, 233, 283, 595.
- FORGERY
 of King's seal, 510.
 of trade mark, 532.
 Act, 1861...562, 586, 614.
 at common law, 586
 under statutes, 586-589.
- FRANCHISE,
 electoral, 3.
 an incorporeal hereditament, 93.
 examples, 104, 105, 239.
- FRANK ALMOIGN, tenure in, survived general abolition of feudal tenures, 118.
- FRAUD,
 presumption of, by statute 27 Eliz. c. 4...199.
 or deceit, ground of action *ex delicto*, 435.
 upon creditors, offence of, 506, 529-531.
- FRAUDS, STATUTE OF, 145, 199, 213, 281.
- FRAUDULENT BREACH OF TRUST, 582, 583.
- FRAUDULENT PREFERENCE by bankrupt, avoidance of, 273.
- FREE BENCH, widow's right of, in copyhold lands, 79.
- FREE FISHERY, nature of right considered, 106.
- FREEHOLD ESTATES, in land, &c., 122-142.
- FREIGHT,
 insurable interest in, 362.
 when policy attaches, 367.
- FRIENDLY SOCIETIES ACTS, 1875-1895...53.
- FUNERAL EXPENSES have priority to debts, 288.
- FURLONG, 120 *n*.

- GAMBLING HOUSE, offence of keeping, comprised in Vexatious Indictments Act, 1859...605.
- GAMING AND WAGERING, criminal law relating to, 551-557.
- GARNISHEE ORDER, 242-244.
- GAVELKIND, customary mode of conveyance of lands held in, 205.
- GENERAL AGENT, authority of, 386.
- GENERAL AVERAGE, principle explained, 380-382.
- GENERAL LEGACIES abate proportionally (if necessary) for payment of debts, 291.
- GIFT, title by, 225, 244.
- GLANVILLE (*De Legibus*),
 meaning of "law" as implied in this work, 1.
 influence of work in Scotland, 7.
- GOLD MINES in England belong to the Crown, 99.
- GOODS, contract for sale of, 248 *et seq.*
- GOODWILL, 234.
- GOVERNOR-GENERAL (of India), powers of, under Indian Councils Act, 1861... 23.
- GRAND JURY, proceedings of, described, 614, 615.
- GRANT, title by, 225, 244.
- GRATUITOUS BAILMENTS, 336-338.
- GROSS, common in, distinguished from *Appendant* or *Appurtenant*, 101.
- GROUND GAME ACTS, 1880, 1906...223.
- GUARDIAN AND WARD,
 status classified, 21.
 described, 87-90.
 obligations between, 411.
- GUARDIANSHIP OF INFANTS, proceedings relating to, assigned to Chancery Division, 448.
- GUARDIANSHIP OF INFANTS ACT, 1886...88.
- HABEAS CORPUS ACT, 1679 (31 Ch. II. c. 2), 29.
- HABENDUM, clause in a deed, 200.
- HEARING of complaint (criminal) before justices, 609.
- HEIR, has now no title without grant of Court, 181, 217.
- HEIRLOOMS, power to sell under Settled Land Acts, 152.
- HEREDITAMENT,
 meaning of the word, 98, 99, 100.
 freehold estates in, 122-142.
- HERIOT, customary right to, 240.
- HIGH COURTS OF JUDICATURE in India, establishment of, 24.
- HIGH COURT OF JUSTICE,
 a branch of Supreme Court under Judicature Acts, 445.
 as a Court of criminal jurisdiction, 595.

HIGHWAY. *See* RIGHT OF WAY—PUBLIC.

HIRING AGREEMENTS, 337, 356.

HOLDING OUT, principle liberally applied to liability of principal for acts of agent, 385.

HUSBAND, surviving, entitled to administration, 284.

HUSBAND AND WIFE, *status* of, 31, 54–82.

HYPOTHECA,
corresponds to mortgage in English law, 305.
(of goods) in Scotch law, 316.
landlord's right and maritime lien, 317.

HYPOTHECATION,
letters of, relating to goods in transit from ship to warehouse, not affected by Bills of Sale Act, 316.
powers of, by master over ship, freight, and cargo, 398.

ILLEGAL TRAINING AND DRILLING, 510, 512.

ILLEGALITY, ground for avoiding contract, 332–336.

ILLEGITIMATE CHILD. *See* BASTARD.

IMMOVEABLE, as distinguished from moveable, things, 98.

IMPERIAL PARLIAMENT,
supreme legislative authority of, in all Colonies, 18.
power to modify rules of succession of the Crown, 33.

IMPORTATION of food and drugs, offences relating to, 529, 535–539.

IMPRESSMENT, liability of seamen to, 46.

IMPROVEMENTS under Settled Land Acts, 152.

INCAPACITY,
ground for annulling marriage, 56.
contractual, 329.

INCITING TO MUTINY, &c., offences of, 510, 512, 546.

INCLOSURE ACTS,
policy of, explained, 102.
highways created by, 109.

INCORPOREAL things, 98, 218.

INDECENT ASSAULT, comprised in list of offences in the Vexatious Indictments Act, 1859...605.

INDEMNITY, right of trustee to, 412, 413.

INDIA,
influence of English law in, 19–27.
powers of Secretary of State and Council, 23.
High Courts of Judicature in, 24

INDIAN CODES, 26.

INDICTMENT,
remedy by, against public company exceeding their powers, 52.
usual form of proceeding for criminal trial, 604.
framing of, 611–614.

INDUSTRIAL AND PROVIDENT SOCIETIES, Acts relating to, 52.

- INFANT (tenant for life),
 exercise of powers under Settled Land Acts, 154.
 incapable of alienating property, 185.
 making a will, 279
 contracting, 329.
- INFORMATION, a mode of commencing criminal proceedings, 604, 618.
- INFRINGEMENT of patent, how interlocutory application for injunction disposed of, 482.
- INHERITANCE in fee-simple, rules of, 181-185.
- INHERITANCE ACT, 1833...182, 185, 186.
- INJUNCTION,
 against public company exceeding their power, 52.
 power to grant, under Judicature Acts, 180
 interlocutory application for, how disposed of, 482.
- INNKEEPER, liability at common law, 353.
- INSANITY,
 at the time of contracting marriage, ground of nullity, 56.
 as a ground of incapacity to alienate property, 195.
 make a will, 279.
 general incapacity to contract, 321.
 jurisdiction in relation to, 446.
- INSOLVENT ESTATES of deceased persons, administration of, in bankruptcy, 497.
- INSURABLE INTEREST, 358-364.
- INSURANCE, contract of, 337, 357-384.
- INTENTION,
 what kind of, essential to crime of murder, 563.
 manslaughter, 564.
 to excuse act causing death, 565.
- INTENTIONAL ACT causing injury, 420, 425-436.
- INTEREST and usury, described, 356.
- INTERLOCUTORY ORDERS, 481, 482.
- INTERPLEADER, proceeding described, 484.
- INTERPRETATION ACT, 1889...100.
- INTESTACY, grant of administration on, 284.
- INTESTATES ESTATES ACT, 1890...79.
- INVENTION, title by, 225, 228, 237.
- IRELAND,
 English law in relation to, 9-15.
 essential solemnities of marriage in, 61-64.
 where husband domiciled in, divorce only obtainable by Act of Parliament.
 71, 442.
 domicile or residence in, excludes service of writ out of jurisdiction, 464.
- IRREGULAR MARRIAGES, effect of Scotch law, 65, 66.
- ISLANDS in British seas, how affected by English law, 15, 16.
- JEWISH RELIGION, marriage between persons professing, 59, 60, 63.
- JOINDER of causes of action, 469.

JOINT TENANCIES

of lands, &c., described, 168-172
how destroyed, 170-172.

JUDGE, privilege of, in relation to libel or slander, 432.

JUDGMENT,

title to personal property by, 225, 242-244.
in default of appearance, 465.
summary, 466.
in default of pleading, 475.
dates and effect of, 481.
of foreign Court *prima facie* evidence of liquid debt, 491.

JUDGMENT CREDITOR, his remedies against debtor's property, 158, 159.

JUDGMENTS EXTENSION ACT, 1868...491.

JUDICATURE ACTS, 1873-1891...2, 180, 244, 437, 445, &c.

JUDICIAL, mode of exercise of sovereign authority, 3, 5.

JUDICIAL COMMITTEE of Privy Council, 19, 24.

JUDICIARY LAW, distinguished from Statute, 6.

JURISDICTION

of courts affecting matrimonial *status*, 67-71.
in matrimonial causes, 68.

JURY,

summoned by sheriff, 39.
in civil procedure, 452.
right to claim trial by, under Summary Jurisdiction Acts, 624.

JUS MARITI, in Scotch law, 80.

"JUST AND CONVENIENT," when Court may grant injunction or appoint receiver, 180, 244, 482.

JUSTICE OF THE PEACE,

appointment of, by commission, 40.
application to, for warrant or summons, 608, 609.
hearing of complaint by, 609.
duties of as to commitment and bail, 610.

KING,

status of, 32-35.
exemption from legal proceedings, 34.
a corporation sole, 47.

KING'S BENCH DIVISION of High Court, matters assigned to, 448.

KING'S ENEMIES, exception from liability of common carrier, 253.

KING'S INNS in Dublin, institution of, 11.

KINGSDOWN'S ACT, LORD (the Wills Act, 1861), 281.

LANCASTER, Court of Chancery of County Palatine of, 444.

LAND, property in, defined, 98-100.

freehold estates in, 122-142.
estates less than freehold in, 142-147.
rights by way of security over, 155-159.

LAND MEASUREMENT, standards of, 120.

LAND TRANSFER ACTS, 1875-1897...181-207, 208, 217.

LANDLORD AND TENANT,
emblems, 144.

estates and interests, described, 142-147.

LANDS CLAUSES CONSOLIDATION ACT, 1845...50, 148, 325.

LAPSE of legacy, 291.

LARCENY (or theft) at common law, 576.

LARCENY ACTS, 1861-1901...561, 576-586, 614.

LAW,

defined, 1.

Roman, influence of, 2, 8.

statute, and judiciary, 6.

LEASE,

creates an estate for years, 142.

for three years and upwards, must be in writing, 145.

covenants running with the land or otherwise, *ibid.*

power to grant, under Settled Land Acts, 150.

LEASEHOLD, disclaimer by trustee in bankruptcy, 274.

LECTURES, copyright in, 232.

LEGACY, duty of executor to pay, 291.

LEGAL ESTATE, still of importance in conflict of titles, 142, 156.

LEGISLATURE, sovereign, 3.

in colonies, 7.

LEGITIM, right of children to share in personal succession, 84.

LETTERS PATENT, constituting legislative powers in colony, 17.

LEVANT AND COUCHANT, as applied to commonable beasts, explained, 102.

LEVEL CROSSING, duty of railway company at, 423.

LEX JULIA MAJESTATIS, Bracton's description of treason suggested by, 506.

LEX RHODIA DE JACTU, foundation of the law of general average, 381

LIBEL,

as ground of civil liability, 431-435.

justification of, 433, 434.

in criminal law, 523, 526-528.

comprised in Vexatious Indictments Acts, 606.

LICENCE to trade with enemy's country, 43.

LIEN,

vendor's, for unpaid purchase money, 159.

right described, 300.

vendor's, for sale of goods, 301, 302.

maritime, 320-322.

LIFE,

tenant for, described, 138 *et seq.*

salvage under Merchant Shipping Act, 1894...409

LIGHT, right of, explained, 103-104.

LIMITATION,

none against the Crown by common law, 35.

Acts relating to real property, 191.

LITIS CONTESTATIO, represented in modern procedure by appearance, 450

- LLOYDS, practice as to making contracts of insurance, 364
- LOAN, 336, 337.
- LOCAL GOVERNMENT ACTS, 49.
- LODGERS GOODS PROTECTION ACT, 1871...319.
- LORD CAMPBELL'S ACT (justification of libel), 434.
- LORD CHANCELLOR,
 his office in the nomination of sheriffs, 39.
 his jurisdiction in lunacy, 446.
 Chancery, 447.
- LORD MAYOR'S COURT, jurisdiction of, 444.
- LUNATIC. *See* INSANITY.
- MACAULAY, LORD, his legislative work for India, 21, 25.
- MAGNA CHARTA,
 power of sheriff restricted by, 39, 40.
 recognition of rights of wife and children in goods of deceased, 275.
- MAID OF NORWAY, succession to Scotch Crown of, 326 *n*.
- MAINE, SIR HENRY,
 his legislative work in India, 26.
 on Village Communities, 120.
- MAINTENANCE,
 obligation of, by parent to child, 83-87.
 as ground of illegality in contracts, 333.
- MATTLAND, PROFESSOR,
 on writs sent for use in Ireland (temp. Hen. III.). 11.
 Domesday Book and beyond, 120.
- MALICIOUS DAMAGE TO PROPERTY, 561, 562, 589-594.
- MALICIOUS PROSECUTION, ground of action *ex delicto*, 435.
- MANAGER (if necessary), creditor's remedy under Railway Companies Act 1867...51.
- MANDAMUS
 against company to perform express statutory obligations, 51.
 prerogative writ of, 437, 448.
- MANOR, features of, described, 119-122.
- MARINE INSURANCE ACT, 1906...357 *n*.
- MARITIME LIEN, described, 320-322.
- MARKET OVERT, 257-259.
- MARRIAGE,
 essentials of, 54, 55.
 legal capacity relating to, 56, 57.
 solemnities (England), 57-61.
 (Ireland), 61-64.
 (Scotland), 64-67.
 jurisdiction of Court affecting *status*, 67-71
 effects in regard to property (England and Ireland), 71-79.
 (Scotland), 80, 81.
 conflict of laws as to *status*, 82.
 title to personal property by, 225, 241.

- MARRIED WOMEN'S PROPERTY ACTS, 74-77, 155 *u.*, 196, 241, 270, 279, 286, 331.
- MASTER of ship,
his lien, 321.
his powers, 395-398.
- MASTER AND SERVANT,
status classified, 31.
described, 90-96.
- MATRIMONIAL CAUSES ACTS, 1857-1878...88.
- MERCHANDISE MARKS ACT, 1887...532.
1891...535, 606.
- MERCHANT SHIPPING ACT, 1894...93, 321 *et seq.*
- MERGER of estates explained, 166, 167.
- MERTON, STATUTE OF. *See* STATUTE OF MERTON.
- MILDMAY'S CASE, 132.
- MINES of gold and silver belonging to the Crown, 99.
- MINING LEASE, power to grant under Settled Land Acts, 150.
- MINISTERS OF THE CROWN, responsibility of, 4.
- MORTGAGE,
described, 156-159.
actions for redemption and foreclosure, assigned to Chancery Division, 447.
- MORTMAIN ACTS, 193.
- MOVEABLE and immoveable things distinguished, 98.
- MUNICIPAL CORPORATIONS, Acts relating to, 48, 49.
- MURDER, and manslaughter, &c., 562-568.
- MUSICAL COMPOSITIONS, copyright in, 229.
- MUTINY
(Indian), proximate cause of assumption of direct government by the Queen, 22.
offence of inciting to, 510, 512, 546.
- NAME and arms clause, under Statute of Uses, 128.
- NATURALIZATION,
means of, provided by statute, 41.
effect where obtained with treasonable intent, 42.
- NAUTÆ, CAUPONES, &c., Prætor's edict, 353.
- NAVAL AND MILITARY COURTS, privileged, as to actions for libel or slander, 432.
- NAVAL PRIZE ACT, 1864...225.
- NAVAL VOLUNTEERS ACT, 1853...45, 46.
- NAVY, organization of, 45, 46.
- NEGLIGENCE, causing injury, 416, 422-425.
- NEGOCIORUM GESTIO, ground of obligation, 408-411.
- NEGOTIABLE INSTRUMENT,
transfer of property by, 259 *et seq.*, 299.
law as to, not affected by the provisions for restitution under Larceny Acts, 585.

- NEW TRIAL, application for, in cases of misdemeanour, 628.
- NEWSPAPER, proprietor of, when liable for libel, 431, 434.
- NEW ZEALAND, in parts of North Island, native land customs preserved, 17.
- NEXT OF KIN,
when entitled to administration, 284.
beneficial rights under Statute of Distributions, 295.
- NIGHT POACHING ACTS, 525.
- NOTICE of writ, when service ordered of, 464.
- NOVATION by judgment, 415.
- NUDUM PACTUM*,
contract without consideration, 246.
meaning of, in Roman law, 406.
- NUISANCE,
mandamus to public company to execute power to abate, 51.
liability for, 417-421.
criminal, 548-560.
- OATH, offence of administering unlawful, 510, 512.
- OBLIGATION,
its relation to *status* and property, 27.
definition of, in Justinian's Institutes, 30, 328.
by contract or otherwise, 31.
quasi ex contractu, 408-415.
- OCCUPANCY,
title to land by, 189-191.
personal property by, 225-237.
- OFFICES are incorporeal hereditaments, 98, 104.
- OFFICIAL SECRETS ACT, 1839...513
- ORDER AND DISPOSITION of bankrupt, title of trustee to goods in, 272.
- ORDER IN COUNCIL,
carrying out minor details of legislation, 4.
legislative authority exercised by, in Crown Colony, 17.
- ORIGINATING SUMMONS, action commenced by, 474.
- ORNAMENTAL TIMBER, excepted from power of Court under Settled Land Acts, 153.
- OXFORD,
Chancellor's Court of University, 445.
ancient criminal jurisdiction of, obsolete, 603.
powers of authorities to act as justices of peace, *ibid.*
- OYSTERS, stealing from oyster bed, a felony, 579.
- PALMERSTON, LORD, discussion with Queen Victoria and the Prince Consort upon foreign despatches, 5.
- PARENT AND CHILD,
status classified, 31.
rights resulting from *status* of, 83-87.

- PARISH COUNCIL, a body corporate, 49.
- PARISH MEETING, under Local Government Act, 1894...44.
- PARLIAMENT. *See* IMPERIAL PARLIAMENT.
- PARSON, a corporation sole, 47.
- PARTICULARS, order for, under summons for directions, 475.
- PARTIES,
to action, 467-469.
costs between, 487.
- PARTITION,
powers of, under Settled Land Acts, 150.
conveyance by, how effected, 205
action for, assigned to Chancery Division, 448.
- PARTITION ACT, 1868...152, 171.
- PARTNERSHIP,
share in, personal property, 218.
as a contract, 337, 399-406.
action for accounts, &c., assigned to Chancery Division, 417.
assets, application of, in bankruptcy, 496.
- PARTNERSHIP ACT, 1890...399, 401-406.
- PASTURAGE,
comprised in right of common, 101.
described, 102.
- PATENT,
invention, right to, is personal property, 218.
title of true and first inventor, 228.
interlocutory application for injunction, how disposed of, 482.
- PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883-1888...237, 533.
- PEER, privileges of, 38.
- PENRITH, grant of manor by Henry III., 326 *n*.
- PER STIRPES*, succession, as to land explained, 184.
- PERILS OF THE SEAS, in bill of lading or policy of insurance, 376.
- PERJURY, 518, 520, 605.
- PERPETUITIES, rule as to, 164.
- PERSONAL PROPERTY,
distinguished from real, 98.
descent of, 99.
various kinds of, described, 217-224.
- PETITION OF RIGHT, 34.
- PHOTOGRAPHS, copyright in, 232.
- PLEADINGS,
modern rules relating to, 470-473.
trial without, 473.
- PLEDGE,
described, 298, 299.
as a contract, 337, 347, 348.
- POSSESSION, an element of title, 177.
- POSSE COMITATUS*, or power of the country, summoned by sheriff, 39.
- POWERS OF SALE under Settled Land Acts, 150.

- POWERS of tenant for life under Settled Land Acts, 148-155.
- POYNING'S ACT, 13.
- PRECIPE*, tenant to, in recovery proceedings, 134.
- PRELIMINARY ACT, in actions for collision at sea, 472.
- PREMISES, in a deed, 200.
- PREMIUM, on policy of insurance, when returnable, 384.
- PREROGATIVE,
title of Crown by, 225, 238.
writs (*mandamus*, &c.), 436, 448.
- PRESBYTERIANS, forms of marriage between, in Ireland, 63.
- PRESCRIPTION,
by common law, does not run against the Crown, 35.
corporations by, 48.
title to land by, 191-193.
- PRESCRIPTION ACT, 1832...103.
- PREVENTION OF CORRUPTION ACT, 1906...561, 606.
- PRIVILEGE,
defence of, in defamation or libel, 431-435.
of Parliament formerly a protection to debtors, 492.
- PRIVY COUNCIL,
appeal to, from Courts of Jurisdiction in Colonies, 19.
from Courts in India, 24.
- PRIZE, jurisdiction as to, formerly exercised by Court of Admiralty, 441.
- PROBATE,
of will, 274 *et seq.*
in common, or solemn, form, 289.
Court of, jurisdiction, 441.
Division of High Court, business assigned to, 448.
- PROHIBITED DEGREES in relation to marriage, 56.
- PROHIBITION, prerogative writ, 437, 448.
- PROMISE and consideration (generally), 337, 406, 407.
- PROMISSORY NOTE, 336, 340.
- PROOF OF DEBTS, in bankruptcy, 495.
- PROPERTY,
and *status*, 24-31.
effect of marriage with regard to, 71-81.
- PUBLIC, offences relating to, (generally) classified, 506.
- PUBLIC EXECUTIVE OFFICIALS, offences relating to, 510, 514.
- PUBLIC HEALTH ACT, 1875...538, 548.
- PUBLIC JUSTICE, offences against, 506, 518-523.
- PUBLIC MORALS, criminal offences against, 547, 550-557.
- PUBLIC OFFICE, refusal to serve, a misdemeanour, 515.
- PUBLIC PEACE, offences against, 506, 523-528.
- PUBLIC RIGHT OF WAY, nuisance by interference with, 548, 558-560.
- PUBLIC REVENUE, offences against, 510, 515.

- PUBLIC SAFETY**,
 duty to keep premises so as not to endanger, 416.
 criminal offence against, 519.
- PUBLIC STORES**, offences relating to, 510, 513.
- PUBLIC TRADE**, offences against, 506, 529-543.
- PUBLIC TRUSTEE**, under Act of 1906, a corporation sole, 54.
- PUBLIC WORSHIP**, offences against, 506, 515, 517.
- PURCHASE**,
 title by, explained, 126-186.
 described, 186-196.
- PURCHASER** affected by notice of equitable title, 142, 156.
- QUAKERS**, form of marriage between, 59, 60, 63.
- QUARTER SESSIONS**,
 administrative business now transferred to County Councils, 49.
 criminal jurisdiction of, 598-600.
- QUASI EX CONTRACTU**, obligations, 328, 408-415.
- QUEEN**
 (regnant), *status* of, 32-35.
 (cousort), *status*, 36.
- QUEEN VICTORIA**, personal influence of, 5.
- QUIA EMPTORES**, no similar statute in Scotland, 8.
- QUO WARRANTO**,
 against corporation exceeding its powers, 54.
 prerogative writ of, 437, 448.
- RAILWAY AND CANAL TRAFFIC ACT**, 1854...353, 354.
- RAILWAY COMPANY**, remedies of execution creditor under Act of 1867...51.
- RAILWAYS CLAUSES CONSOLIDATION ACT**, 1845, companies under special Acts incorporating, 50.
- RAILWAY ROLLING STOCK PROTECTION ACT**, 1872...319.
- RAPE, &c.**, 562, 575.
- RATIFICATION**, by principal of agent's act, 386.
- REAL**, meaning of, as applied to property, 98.
- REAL PROPERTY ACT**, 1815...162, 193, 205.
- REAL PROPERTY LIMITATION ACTS**, 191.
- RECEIVER**,
 creditor's remedy against railway company, 51, 159.
 property of judgment debtor, 159.
 power to appoint, under Judicature Acts, 180, 244.
 when ordered upon interlocutory application, 482.
- RECITAL**, in deed, 200.
- RECORD**,
 Court of, powers, 438.
 High Court of Justice is, 445.

- RECOVERY, proceeding described, 130 *et seq.*
- RECOVERY OF POSSESSION OF LAND, judgment for, 180.
- RECTIFICATION of written instruments assigned to Chancery Division, 417.
- REDDENDO clause of a formal deed, 200, 201.
- REDEMPTION, action for, assigned to Chancery Division, 447.
- "REGIAM MAJESTATEM," mainly copied from Glanville, 8 *n.*
- REGISTRAR,
for marriages (in England), 60.
(in Ireland), 64.
- REGISTRATION OF DEEDS, 206-208.
- RELEASE of trustee in bankruptcy, 274.
- RELIGION, offences against, 506, 515.
- REMAINDERS, vested and contingent, described, 160-164.
- RENT, nature of, described, 107, 108.
- RENT-CHARGE,
a species of incorporeal property, 98
origin and effect of, 108.
- REPAIR of highways, duty of, 558-560.
- REPLEVIN, survival of an ancient remedy, 430.
- REPRESENTATION
and concealment, in relation to contract of insurance, 358, 365.
case depending on, convenient for trial in Chancery Division, 449.
- REPUTED OWNERSHIP, principle borrowed from Scotland, 306, 307.
- RESERVOIR, duty of person constructing, 417-420.
- RESIDUE, application of, by executor, 292.
- RESTITUTION of property on conviction of theft or fraudulent breach of trust,
258.
- RESTRAINT ON ANTICIPATION, does not affect powers under Settled Land Acts,
155.
- RESTRAINT OF TRADE, contract in, generally bad, 333.
- RETAINER of debt by executor, 290.
- RETURN OF PREMIUM on insurance, 384.
- REVERSION, described, 164 *et seq.*
- RIGHT IN SECURITY
over lands, &c., 155.
moveables, 297-322.
- RIGHT OF WAY
(private), a species of incorporeal property, 93.
described, 103.
(public), distinguished, 103.
described, 109-114.
criminal interference with, 548, 558-560.
- RIOT, 523, 524.
- ROBBERY, a felony, 579.
- ROMAN CATHOLICS, marriage between, in Ireland, 62.

- ROMAN LAW,
its influence in England, 2
in Scotland, 8
- ROUT (and Riot), 523, 524.
- ROYAL ASSENT,
necessary to Act of Parliament, 4.
imperial and colonial legislation distinguished, 18.
- ROYAL FAMILY, *status* of, 36, 37.
- ROYAL GRANT, may create a fee determinable on condition, 127.
- RULES OF COURT under Judicature Acts, 4, 445.
- SAIL, warranty to, within certain time, 369.
- SALE,
powers of, under Settled Land Acts, 150.
agency with power of, 252, 257.
in market overt, 257, 259.
under legal process, 261.
as a contract, 336, 344-346.
insurable interest, when created by, 360.
of food and drugs, offences relating to, 529, 535-538.
- SALE OF GOODS ACT, 1893...248, 251, 301-305.
- SALVAGE,
ground of maritime lien, 320.
of life, obligation arising from, 409.
- SCOTLAND,
influence of English law in, 7-9.
office of sheriff in, 39.
essential solemnities of marriage in, 64-67.
action for divorce in, 69.
law of, relating to property of husband and wife, 80.
why feudal forms maintained in, 121.
domicile or residence in, excludes service of writ out of jurisdiction, 464.
- SEAL to a deed, 202.
- SEAMEN, rights of, under Merchant Shipping Act, 1894...321.
- SEAWORTHINESS OF SHIP,
obligation of owner by Merchant Shipping Act, 94.
implied warranty of, in contracts of carriage of goods, 351.
in voyage policy, 368.
- SECRETARY OF STATE for India, under Act of 1858...23.
- SECURITY,
rights by way of, over lands, 155-159.
over moveables, 297-322.
- SECURITY FOR COSTS, when ordered and how given, 486-488.
- SEDITION and seditious libel, 510, 511.
- SEDUCTION, action for, in English law, based on relation of master and servant, 95.
- SEEBOHM on Village Communities, 120
- SEISIN
of land, 297.
of chattels, *ibid.*

- SEPARATE ESTATE of married women in English law, 72-77.
- SERVANT, domestic, implied terms of service, 91.
- SERVICE of writ, 462-464.
- SERVILE *Status*,
 has long disappeared from English law, 28, 90, 97.
 and still earlier in Scotland, 122.
- SESSION, Court of, in Scotland (created 1532), 8.
- SETTLED LAND ACTS, 1832-1890...89, 109, 139, 143-155, 325.
- SETTLEMENT, Acts of, 33.
- SEVERAL OR JOINT, tenancy in regard to lands, 168.
- SHARES, in companies, &c., personal estate, 218.
- SHERIFF,
 his office in execution of judicial sentences, 6.
 first appointment of, for Wales (12 Edw. I.), 7.
 for Ireland, 10.
 functions of, in England and Scotland, contrasted, 39, 40.
 ordinary jurisdiction of his court superseded by County Courts under modern Acts, 443.
- SHIP, unseaworthy, knowingly sent to sea with danger to life, a misdemeanour by Act of 1894...94.
- SILVER MINES (in England) belong to the Crown, 99.
- SIMONY, defined, 194.
- SLANDER. *See* DEFAMATION.
- SLAVERY. *See* SERVILE *Status*.
- SOCAGE, tenure in, described, 118.
- SOLICITOR and client, costs between, 487.
- SOLICITORS OF SUPREME COURT,
 agents practising in the High Court, &c., 453.
 admission, privileges, and duties of, 454-459.
- SOVEREIGN,
 in relation to law, explained, 1, 3.
 authority, legislative, executive, judicial, 3-6.
- SPECIFIC PERFORMANCE of contracts for sale of land, assigned to Chancery Division, 447.
- STAFF of the Courts, 451.
- STATUS,
 and property, 27-31.
 public conditions, 32-54.
 private conditions, 54-96.
- STATUTE DE DONIS (1285), 123-128 *et seq.*
- STATUTE LAW, distinguished from judiciary law, 6.
- STATUTE OF DISTRIBUTION, 282, 293, 294-297, 502.
- STATUTE OF FRAUDS, 145, 199, 213, 281.
- STATUTE OF MERTON,
 practice to enclose portions of a common under, 102.
 now requires consent of Board of Agriculture, 103.
 consent of "homage" under, 118.

- STATUTE OF USES, 8, 108, 123, 140 *et seq.*, 161, 209, 216.
- STATUTE OF WALES (12 Edw. I.), 7.
- STATUTE "QUIA EMPTORES" (18 Edw. I.),
prohibited creation of new subordinate tenures, 117.
stated and explained, 123, 125 *et seq.*
- STATUTE OF WESTMINSTER
the Second, c. 24 (giving extended powers to clerks framing writs), 426, 439.
c. 46 (relating to inclosure of commons), 102.
- STATUTORY DUTY, obligation to perform, 421.
- STAY of Proceedings under arbitration clause in contract, 469.
of execution, appeal does not generally operate as, 486.
- STEPHEN (Sir J. Fitzjames), his Indian Evidence Act, 26.
- STIFLING criminal prosecution, 334, 518, 522.
- STOLEN GOODS, restitution of, on conviction, 258.
- STOPPAGE IN TRANSITU, 302-304.
- STRAFFORD, Lord, cited by French writer as typical example of ministerial responsibility, 5 *n.*
- STRANDING OF SHIP, how construed in insurance policy, 371.
- STREAM. *See* WATER.
- STUART MOORE
as to right of free fishery, 103.
on rights of foreshore, 107.
- SUCCESSION,
to the Crown, 32-34.
title to personal property by, 225, 249.
- SUING AND LABOURING clause in policy, 373.
- SUMMARY JURISDICTION ACTS, 600, 601.
proceedings under, 619-625.
appeal under, 629-632.
- SUMMONS,
for directions, 474.
to appear to answer criminal information, 609.
under Summary Jurisdiction Acts, 620.
- SUPREME COURT OF JUDICATURE, under Judicature Acts, 445.
- SURVIVORSHIP, accretion of title by, 170.
- TACITUS, passage relating to village customs, 121.
- TALTARAM'S CASE, stated and explained, 123, 131 *et seq.*
- TANISTRY, custom of, in Ireland, 2.
- TENANCY IN COMMON, described, 175-177.
- TENANT IN TAIL,
described, 128 *et seq.*
powers of, under the Settled Land Acts, 149.
- TENANT AT SUFFERANCE, described, 147.
- TENANT AT WILL, described, 146.
- TENANT FOR LIFE,
described, 137-142
powers of, under the Settled Land Acts, 90, 139, 148-155.

- TENANT FROM YEAR TO YEAR described, 146.
- TENEMENT,
land as the subject of tenure, 100.
freehold estates in, 122-142.
- TENENDAS, clause in a formal deed, 200.
- TENURE, origin of, explained, 114-119.
- TERGE of land, widow's right of, in Scotch law, 80.
- TERRITORIES governed by English law, 7 *et seq.*
- TESTAMENT, title to personal property by, 225, 274-284.
- THINGS, classed as corporeal or incorporeal, 98.
- THREATENING LETTERS, sending, &c., offence of, 523, 526, 579.
- TITHE ACTS, 1836-1891...101.
- TITHE RENT-CHARGE, a species of incorporeal property, 98.
- TIMBER, right to cut for improvements, under Settled Land Acts, 153.
- TIME POLICY, no implied warranty of seaworthiness, 369.
- TITLE,
of dignity, 37, 38.
defined by Coke, 177.
essentials to, 177-181.
to lands, &c., by descent, 181-185.
purchase, 186-196.
prescription, 191-193.
forfeiture, 193, 194.
alienation, 194-196.
personal property, 225-297.
by occupancy, 225-237.
by prerogative and forfeiture, 225, 238-240.
custom, 225, 240.
succession and marriage, 225, 240-242.
judgment, 225, 242-244.
gift or grant, &c., 225, 244-269.
bankruptcy, 225, 269-274.
testament and administration, 225, 274-297.
paramount, to moveables, indivisible, 298.
assault involving, to land, not to be heard and determined by justices, 569.
- TORT, obligation *ex delicto*, 328, 415-436.
- TOTAL LOSS, in contract of marine insurance, 379, 380, 383.
- TRADE, offences against public, 506, 529-543.
- TRADE DISPUTES ACT, 1906...53, 96, 542, 545.
- TRADE DESCRIPTION, false, 532.
- TRADE MACHINERY, as included in personal chattels, 307.
- TRADE MARK (and Trade Name),
right to, 235, 237.
offences relating to, 529, 531-535.
- TRADE, RESTRAINT OF, contract in, generally bad, 333.
- TRADE UNION,
status under Acts relating to, 52, 53.
engaged in trade dispute, effect of Trades Disputes Act, 1906...96.
in relation to criminal law, 539-543.

- TRAINING AND DRILLING, illegal, an offence, 510, 512.
- TRAP, duty of warning between host and guest, 422.
- TREASON described, 504, 506.
- TREASON ACT, 1851...507.
- TREASON ACT, 1842...510.
- TREASON FELONY ACT, 1848...508.
- TREASURE TROVE, concealment of, 510, 515.
- TREES, right to fell, under Settled Land Acts, 153.
- TRENT, Council of, how law of marriage affected by, 57-59, 64.
- TRE-PASS,
one of the old forms of action for tort, 425, 426-430.
per quod servitium amisit, 426.
- TRIAL,
in civil action, 476-478.
criminal, 615-617.
- TRUST,
right of beneficiary under, an "estate in equity," 123, 323.
by implication of law, 325.
action for execution of, assigned to Chancery Division, 447.
- TRUSTEE,
of settlement for the purposes of Settled Land Acts, 153, 325.
in bankruptcy, competition with execution creditor, 273.
has an insurable interest, 360.
his right to have loss made good out of trust estate, 412, 413.
protected under Trustee Act, 1893...413.
- TUTELA (Guardianship), obligation of, 87 *et seq.*, 408, 411-415.
- ULTIMUS HÆRES, right of Crown as, 35, 503.
- UNDERWRITERS, practice of, at Lloyds, 364.
- "UNDESIRABLE IMMIGRANTS," statute relating to, 43.
- UNIFORMITY, Acts of, 9.
- UNION,
Act of (England and Scotland), 8.
(Great Britain and Ireland), 14.
- UNITY OF ESTATE, described, 168.
- UNLAWFUL ASSEMBLY, 523.
- UNLAWFUL OATHS, offence of administering, 510, 512.
- UNNATURAL CRIMES, 547.
- UNSEAWORTHY SHIP, knowingly sent to sea so as to be dangerous to life, a misdemeanour by Merchant Shipping Act, 1894...94.
- UN SOUND MIND. *See* INSANITY.
- USAGE, evidence of, to explain ancient charter, 48.
- USES, Statute of. *See* STATUTE OF USES.
- USURY and interest, 356.
- USURY LAWS REPEAL ACT, 1854...357.

- Digitized by Microsoft®

- WAY,
 right of (private), a species of incorporeal property, 98.
 of necessity, 103.
 (public), distinguished, 103.
 described, 109-112.
- WESTMINSTER, Statute of. *See* STATUTE OF WESTMINSTER.
- WIDOW,
 discretion of Court to grant administration to, 284.
 right under Statute of Distribution, 294.
- WIFE AND HUSBAND, *status* of, 31, 54-82.
- WILD BEAST, 220-223, 226.
- WILL, execution of, by what law governed, 282, 500.
- WILLS ACT, 1837...213, 278, 279, 281.
- WILLS ACT, 1861...281.
- WINDING-UP order applies generally to companies except railway companies,
 51, 54.
- WITNESS, privilege of, in relation to libel and slander, 432.
- WITNESSES essential to some deeds, 203.
- WORKMEN'S COMPENSATION Acts, 93.
 Act, 1906 (comes into operation 1st July, 1907),
 ibid.
- WRECK, prerogative of the Crown, 239.
- WRIT, commencement of action, 438, 462.
- WRITING made essential for conveyance of land, 199.
- YEARLY TENANCY, described, 146.
- YORKSHIRE REGISTRY ACT, 1884...207.

THE END.

CONSTITUTIONAL LAW OF ENGLAND.

By E. WAVELL RIDGES, Esq, of Lincoln's
Inn, Barrister-at-Law.

Demy 8vo. 1905. Price 12s. 6d., cloth.

" . . . We think this book will be found a very useful compendium of constitutional law. The more especially as it enables the student to **obtain a completer view of the whole field than is obtainable from any other book with which we are acquainted.**"—*Law Notes.*

"Mr. Ridges has produced a book which will rank high as a practical guide on matters constitutional and political; . . . the book is an able and practical contribution to the study of constitutional law."—*Solicitors' Journal.*

STEVENS & SONS, LIMITED, 119 & 120,
CHANCERY LANE, LONDON.

